IACI Idaho Association of Commerce & Industry
The Voice of Business in Idaho®

July 27, 2010

Paula J. Wilson
Hearing Coordinator
Idaho Dept. of Environmental Quality
1410 North Hilton
Boise, ID 83706-1255

Re: Draft Anti-degradation Negotiated Rule
Docket No. 58-0102-1001

Dear Paula:

The Idaho Association of Commerce & Industry (IACI) offers these comments on Draft No. 6 of the Antidegradation Implementation Procedures and suggested rule language presented at the July 21 negotiated rulemaking meeting.

IACI has been very involved in this rulemaking effort since its inception and has had a very active "working group" that has not only included IACI members but other members of the regulated community. This rulemaking has the potential to greatly expand the process and resources required to renew or obtain required Clean Water Act permits. IACI appreciates the need to ensure that our valuable natural resources, such as water quality, are protected; however, we believe there is an approach that can achieve that without cumbersome and resource-intensive administrative processes. Thus, we have had a number of significant concerns with key aspects of the rule that is being developed.

Our approach to this rulemaking has been guided by the following principles, which we believe provide a solid foundation for building on Idaho's water quality program.

Conformance with Legislative Direction and State Statutes.
There can be no doubt about the legislature's intent concerning compliance with the Clean Water Act. Section 39-3601, Idaho Code, states it very clearly: "It is the intent of the legislature that the state of Idaho fully meet the goals and requirements of the federal clean water act and that the rules promulgated under this chapter not impose requirements beyond those of the federal clean water act." To the extent there is doubt concerning other statutory provisions that seem contradictory, the proposed rule must be viewed through the prism of this intent statement.

Utilization of Existing Water Permitting Programs.
The antidegradation procedures need to work with existing water quality and permit programs rather than add new complex and "process" driven requirements. Examples include the identification of Tier I and Tier II waters and how general permits are handled.

Tier I and Tier II Waters: The State regularly reviews data on water quality and identifies those "segments" not meeting water quality standards and designated beneficial uses and such information is useful in determining whether a water segment is Tier I or II. These "impaired waters" are placed on the 303(d) list. However, for this rule making, DEQ has proposed a new "definition" of impaired, that would apply only for the purposes of antidegradation. This definition means that a water segment is not impaired if it is determined that certain biological criteria are met, thus becoming a Tier II water. This approach flies in the face of common sense. Either a water body is impaired (not meeting designated beneficial uses and/or standards) or it isn't. So, instead of utilizing an existing program that determines the status of a water segment, DEQ adds to the complexity and creates a new system where an impaired water segment is not impaired. Also, the rule further complicates the § 303(d) list by evaluating impairment separately for aquatic life uses and recreational uses. This appears to be an attempt to go back to the parameter-by-parameter approach previously rejected by IDEQ at the request of IACI. Finally, the presumption that all waters not assessed are Tier II is inappropriate and not required under the Clean Water Act. We are told by IDEQ staff that this presumption would apply to over 80% of state waters, many of which do not have water in them most of the year.

General Permits: Through the Clean Water Act, EPA has created a number of general permits for sources that are either very similar in nature or not as significant in terms of potential environmental impact. Examples include the Multi-Sector Stormwater Permit and the Construction Stormwater Permit. The Antidegradation procedures need to allow the use of such permits without having to go through a new, separate process each time permit coverage is sought.

Be Consistent with Other Approved Antidegradation Programs

In order to assure acceptance by EPA, the state should craft an implementation plan that is consistent with other state implementation efforts that have been previously approved by EPA or have been found acceptable in federal court decisions. There is no need, particularly in view of the legislature's intent, to create new or expanded provisions that have not been implemented elsewhere.

Balancing Resources, Process-Practicability with Protection.

The Antidegradation Rules need to provide a commensurate level of review with potential for impact on the environment. For example, the antidegradation review process should utilize streamlined processes for discharges in which there are no increases in the discharge of a regulated pollutant or any increase in discharge is insignificant. This also makes good sense given the state's delicate financial situation. DEQ should focus on crafting an implementation plan that makes the most efficient use of existing and currently expected state resources. Any aspects of an implementation plan that requires additional personnel or other resources may not be adequately funded. This would lead to delays in obtaining necessary certifications for EPA permits. The antidegradation implementation effort should be the department's top priority, but, the more resources that are required to implement the plan, the fewer resources will be available for other department programs.

Specific Comments on Draft #6

The key issues that the business community has identified in Draft #6 are as follows:

1. IDENTIFICATION OF TIER I AND II WATERS. IACI has proposed a straight forward manner to address § 303(d) listed waters. Namely, that all § 303(d) waters would not be considered high quality water. This utilizes existing information to provide a consistent technical and regulatory approach to the identification of Tier I and Tier II waters. This approach has been approved by EPA in other states and upheld by a Federal Court of Appeals as consistent with the Clean Water Act.

Draft #6 of the proposed rule does not follow this approach and instead has proposed a number of "exceptions":

- Waterbodies that are not assessed are automatically identified as Tier II waters.
- Waterbodies that are on the 303(d) list for which biological data show no impairment will be identified as Tier II waters.
- Waterbodies that are on the 303(d) list for which there are no biological data will be automatically identified as Tier II waters.

These "exceptions" are very problematic. First, the latest draft elevates "biological data," including the presence/no presence of such data, as the arbitrator, whether or not a water body is a Tier I or Tier II water. IACI is not aware of any regulatory or technical reason to use biological data as being the determining factor as to how water bodies should be treated in regards to antidegradation. Second, the latest draft has a new definition for "impairment" which apparently means that waters can be "impaired" for § 303(d) listing but are not "impaired" for purposes of identifying them as high quality waters.[1] IACI does not believe that a special definition of "impairment" is needed. Finally, the draft presumes that waters that have not been assessed in the Integrated Report should be presumed to be Tier II waters. As noted, this represents over 80% of state waters. Such a presumption is not required under the Clean Water Act or state law. These presumptions should be struck from the rule. For waters that have not been assessed, a more appropriate starting place is classification as a Tier I water. Such waters cannot be identified as a Tier II water *as there is no data to support such a determination.* Tier I provides for "existing uses and the water quality to protect such uses to be maintained and protected." Thus, a Tier I designation provides protection while additional data is collected to provide a technical basis for designation.

The approach in draft #6 is overly protective and complex, resulting in significant costs to regulated entities seeking permits on such waters. As stated earlier in these comments, the Antidegradation Policy needs to utilize existing water quality program elements, not create new and complicating ones and make decisions (such as what is a Tier II water) based on data, not assumptions.

[1] This "double" definition of impairment raises the issue of the appropriateness of standards and designated beneficial uses. If the biological data show no impairment, then it raises the issue of whether the criteria for aquatic life uses is appropriate. In any event, common sense dictates that is a water body or segment is deemed to be impaired for not meeting a designated beneficial use, then it should not be declared "no impairment" for other purposes.

2. SCOPE OF WATERS COVERED. The draft proposes to apply the rule to "waters of the state." This is not necessary to meet the requirements of the Clean Water Act. We reiterate our position that this rule in 052.01 should apply only to "navigable waters of the United States." Proposed language is:

> **01. List of waters protected**. All navigable waters of the United States receive Tier I protection. Waters receiving….

We seriously doubt the Idaho Legislature intended to expand the scope of antidegradation requirements beyond the requirements of the Clean Water Act, particularly in light of the declaration of policy found at Idaho Code § 39-3601. However, if IDEQ believes that the Legislature had directed IDEQ to apply antidegradation to all waters of the state, we would propose amending the statute at the next legislative session to address this issue and other necessary statutory revisions which have been brought up in the subject rule-making. Nevertheless, since this rule will ultimately be submitted to EPA for its approval after approval by the Board and the Legislature, and since EPA only has jurisdiction over navigable waters of the United States, then the rule should be confined to waters of the United States.

3. EXEMPTION OF INSIGNIFICANT DISCHARGES. As stated in earlier comments by IACI, having a provision for insignificant discharges is very important to the regulated community as it ensures that resources of both the regulated community and DEQ are focused on *significant* discharges in terms of the evaluation of antidegradation. The proposed values for determining "insignificance" are appropriate; however, the proposed language by DEQ does not accomplish this. IACI has the following specific language changes:

- The language for "insignificant discharge" should be moved from **06. Tier II Analysis** to **05. Evaluation of effect of a permitted or licensed activity or discharge on water quality**. The question of whether or not a discharge is insignificant is a technical question that is more appropriate for section **05** of the rule rather than in the Tier II procedures found in section **06**.

- There is no need for a modified-Tier II analysis in which "other source controls" analysis is needed for insignificant discharges. We recommend the following language:

> **05. e. Insignificant Discharge**. The Department shall consider the size and character of a discharge and the magnitude of its effect on the receiving waterbody and determine if degradation is insignificant and therefore does not warrant a Tier II Analysis.
>
> i. A discharge is insignificant when:
>
> 1. The proposed change in discharge will cumulatively, from conditions as of July 1, 2011, not cause a decrease in assimilative capacity by more than 10%.

06. Tier II Analysis. A Tier II analysis will only be conducted for activities or discharges subject to a permit or a license that cause significant degradation.

- IACI supports the recommendation of the Association of Idaho Cities that each new or increased permit be subject to a 10% threshold at the time of permit application.

4. GENERAL PERMITS. DEQ proposed language for general permits at the July 21, 2010 negotiated rulemaking meeting. The draft provides for an antidegradation review at the time of issuance of the general permit with DEQ having the ability to determine whether some or all of the activities covered under a general permit require the submittal of additional information. As discussed earlier in these comments, we believe that the Antidegradation Policy should be built on existing water quality program elements (such as general permits) rather than creating new processes. IACI believes that general permits that make provisions for antidegradation should not be subject to additional antidegradation review unless so required by the general permit.

As an example, the Multi-Sector General Permit was written in such a way *as to not require individual NOI antidegradation review* (see attachment). However, the MSGP does require new or increased discharges to Tier II waters to notify EPA. The General Permit then has provisions for requiring additional information (if deemed necessary) or new permit conditions, including an individual permit if warranted. Thus, the MSGP already has built into it the mechanism to address antidegradation; thus the Idaho antidegradation policy needs to be written with the flexibility to utilize this, rather than creating the ambiguity and uncertainty as to what might be required of individual NOI.

Proposed language:

07. General Permits. The Department will conduct antidegradation review, including appropriate Tier II analysis, for general permits at the time at which general permits are certified. For general permits that specifically address antidegradation, such as the 2008 MultiSector General Stormwater Permit, review of individual NOI will be not required unless it is required by the General Permit. For other general permits that do not address antidegradation, at the time a Notice of Intent for coverage is submitted, the Department may conclude that some or all of the activities covered under a general permit require the submittal of additional information. Based on review of that information, antidegradation reviews may be warranted on individual activities covered by the general permit.

5. TIER II ANALYSIS. Draft #6 has detailed procedures for the Alternatives Analysis and Socio-Economic Justification that mirror the State of Washington regulations requiring ALL KNOWN AND REASONABLE TREATMENT (AKART) for wastewater discharges. Idaho's rules and applicable statutes have no such requirement. Therefore these procedures are not appropriate for Idaho. We support the comments of the Idaho Association of Cities in which they also oppose use of the language from the Washington rules and instead suggest language like what is in the Colorado rule (see attachment). IACI supports that comment.

6. SPECIAL RESOURCE WATERS. These waters are treated differently in Draft #6 than either Tier I or Tier II waters, creating a Tier 2 ½. IACI recommends that each SRW be evaluated and managed for antidegradation purposes the same as any other water segment in Idaho. IACI is not aware of any regulatory or statutory language that warrants a special "designation" for SRW. If an SRW is not meeting designated beneficial uses, such water would be a Tier I; if an SRW meets all designated beneficial uses, then it would be classified as a Tier II water. The other provisions related to SRW are best reviewed and discussed in relation to NPDES permits and 401 certifications. Thus, we recommend that **Section 08. Special Resource Waters (SRW)** *be removed from the AntiDegradation Policy.*

7. OTHER ISSUES. Definitions.

a. Degradation or Lower Water Quality. We are concerned that the proposed changes to this important definition in the proposed rule has the potential to eliminate mixing zones and subject antidegradation reviews to beneficial uses that are not supported or designated. Accordingly IACI recommends the following changes:

> **Degradation or Lower Water Quality.** For purposes of antidegradation review and determinations of insignificance means an increase in concentration of a pollutant that is measurable and adverse to existing beneficial uses as calculated after full mixing of the discharge and receiving water.

SUMMARY

The ability for regulated community to obtain the needed CWA permits in an efficient and timely matter is extremely important for economic sustainability in Idaho. IACI has a number of concerns with the requirements in Draft #6 in that it will create a water permitting process that will require considerable resources from the regulated community and government to "process" such permits, that it will result in a permitting process that is unworkable (especially in terms of timeliness) and result in additional expenses that provide no or little environmental benefit. These are costs that cannot be afforded by Idaho government, the citizens of Idaho and the regulated community. IACI requests that the recommendations being proposed be given careful consideration in the preparation of Draft #7.

Sincerely,

Alex LaBeau
President

Enclosures

If a determination has been made in accordance with section 31.8(3)(c) that a proposed regulated activity is likely to result in significant degradation of reviewable waters, a determination shall be made pursuant to this section whether the degradation is necessary to accommodate important economic or social development in the area in which the waters are located. The following provisions shall apply to this determination:

(i) The "area in which the waters are located" shall be determined from the facts on a case-by-case basis. The area shall include all areas directly impacted by the proposed regulated activity.

(ii) A determination shall be made from the facts on a case-by-case basis whether the proposed regulated activity is important economic or social development. If the activity proponent submits evidence that the regulated activity is important development, it shall be presumed important unless information to the contrary is submitted in the public review process. The determination shall take into account information received during the public comment period and shall give substantial weight to any applicable determinations by local governments or land use planning authorities.

(iii) If the proposed regulated activity is determined to be important economic or social development, a determination shall be made whether the degradation that would result from such regulated activity is necessary to accommodate that development. The degradation shall be considered necessary if there are no water quality control alternatives available that (A) would result in no degradation or less degradation of the state waters and (B) are determined to be economically, environmentally, and technologically reasonable.

This determination shall be based on an assessment of whether such alternatives are available, based upon a reasonable level of analysis by the project proponent, consistent with accepted engineering practice, and any information submitted by the public or which is otherwise available. The assessment shall address practical water quality control technologies, the feasibility and availability of which has been demonstrated under field conditions similar to those of the activity under review. The scope of alternatives considered shall be limited to those that would accomplish the proposed regulated activity's purpose. Any alternatives that would be inconsistent with section 25-8-104 of the Water Quality Control Act shall not be considered available alternatives.

In determining the economic reasonableness of any less-degrading water quality control alternatives, the Division may take into consideration any relevant factors, including but not limited to the following, if applicable:

(A) Whether the costs of the alternative significantly exceed the costs of the proposal;

(B) For publicly owned treatment works (POTWs) or public water supply projects, whether user charges resulting from the alternative would significantly exceed user charges for similarly situated POTWs or public water supply projects;

(C) For private industry, whether the alternative would have a significant adverse effect upon the project's profitability or competitive position (if the project proponent chooses to provide such information);

(D) For any dischargers, whether treatment costs resulting from the alternative would significantly exceed treatment costs for any similar existing dischargers on the segment in question.

(E) The relative, long-term, energy costs and commitments and availability of energy conservation alternatives.

(e) Public Participation and Intergovernmental Coordination

Procedural provisions relating to public participation and intergovernmental coordination and antidegradation reviews are set forth in the Procedural Rules, Regulation No. 21, section 21.16 (5 CCR 1002-21).

(f) Public Nomination-Water Quality Based Designations

Any person may nominate any state water for designation as outstanding waters or use-protected during triennial review or at any time. Such nomination shall include written documentation of the qualifications for such designation based upon the criteria in section 31.8(2)(a) or (b).

(g) Protection of Existing Uses

If, during an antidegradation review, it is determined that an existing use of the affected waterbody has not been classified, prior to completing the antidegradation review for an applicable regulated activity, an expeditious rulemaking hearing shall be held (on an emergency basis if necessary) to consider adoption of the additional classification.

31.9 FLOW CONSIDERATIONS

(1) Low Flow Exceptions

Water quality standards shall apply at all times; provided, that in developing effluent limitations or other requirements for discharge permits, the Division shall normally define critical flow conditions using the following low-flow values: the empirically based 30-day average low flow with an average 1-in-3 year recurrence interval (30E3) for chronic standards, (except for temperature limitations, which use the empirically based 7-day average low flow with an average 1-in-3 year recurrence interval (7E3)), and the empirically based 1-day low flow with an average 1-in-3 year recurrence interval (1E3) for acute standards, or the equivalent statistically-based flow. The period of record for determining low flows shall be based on a minimum of ten years of flow data, except that, when ten years of data is not available, low flows may be determined, on a case-by-case basis, using a period of record of less than ten years. If more than ten years of flow data is available, it may be more appropriate to establish low flow conditions based on a longer period of record to more accurately reflect site specific conditions. For streams with seasonal rapidly rising or falling hydrographs, the Division shall use, if so requested by a discharger, the procedure set forth in subparagraphs (a) through (e) below for calculating 30E3 values for those transitional flow periods of the year. For certain substances such as ammonia, the low flow exceptions may be based on periodic or seasonal flows as determined on a case-by-case basis by the Division.

(a) Averaging Procedure – Calculation of 30-day Forward Moving Harmonic Means - Moving harmonic means shall first be calculated for each consecutive thirty-day period in the period of record being considered.

(b) Calculate Annual 30E3 Value - Determine the annual 30E3 value using the procedure set forth in Appendix A using (i) 30-day forward moving harmonic means, and (ii) the excursion procedure for a 1-in-3 year recurrence interval.

(c) Assigning Harmonic Means - Each 30-day harmonic mean shall then be assigned to a month. A harmonic mean shall be assigned to a specific month only if the harmonic mean is calculated using data for 15 or more days from that month.

United States Environmental Protection Agency (EPA)
National Pollutant Discharge Elimination System (NPDES)

MULTI-SECTOR GENERAL PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY (MSGP)

AUTHORIZATION TO DISCHARGE UNDER THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

In compliance with the provisions of the Clean Water Act (CWA), as amended (33 U.S.C. 1251 *et seq.*), operators of stormwater discharges associated with industrial activity located in an area identified in Appendix C where EPA is the permitting authority are authorized to discharge to waters of the United States in accordance with the eligibility and Notice of Intent (NOI) requirements, effluent limitations, inspection requirements, and other conditions set forth in this permit. This permit is structured as follows:

- general requirements that apply to all facilities are found in Parts 1 through 7;
- industry sector-specific requirements are found in Part 8; and
- specific requirements that apply in individual States and Indian Country Lands are found in Part 9.

The Appendices (A through K) contain additional permit conditions that apply to all operators covered under this permit.

This permit becomes effective on September 29, 2008.

This permit and the authorization to discharge expire at midnight, September 29, 2013.

Robert W. Varney, Regional Administrator
EPA Region 1

Carl-Axel P. Soderberg, Division Director, Caribbean Environmental Protection Division
EPA Region 2

Jon M. Capacasa, Director, Water Protection Division
EPA Region 3

Timothy C. Henry, Acting Director, Water Division
EPA Region 5

Miguel I. Flores, Director, Water Quality Protection Division
EPA Region 6

Alexis Strauss, Director, Water Division
EPA Region 9

Michael Gearheard, Director, Office of Water and Watersheds
EPA Region 10

Additionally, EPA may impose additional water quality-based limitations on a site-specific basis, or require you to obtain coverage under an individual permit, if information in your NOI, required reports, or from other sources indicates that your discharges are not controlled as necessary to meet applicable water quality standards.

2.2.2 Discharges to Water Quality Impaired Waters.

2.2.2.1 Existing Discharge to an Impaired Water with an EPA Approved or Established TMDL. If you discharge to an impaired water with an EPA approved or established TMDL, EPA will inform you if any additional limits or controls are necessary for your discharge to be consistent with the assumptions of any available wasteload allocation in the TMDL, or if coverage under an individual permit is necessary in accordance with Part 1.6.1.

2.2.2.2 Existing Discharge to an Impaired Water without an EPA Approved or Established TMDL. If you discharge to an impaired water without an EPA approved or established TMDL, you are required to comply with Part 2.2.1 and the monitoring requirement of Part 6.2.4. Note that this provision also applies to situations where EPA determines that your discharge is not controlled as necessary to meet water quality standards in a downstream water segment, even if your discharge is to a receiving water that is not specifically identified on a Section 303(d) list.

2.2.2.3 New Discharge to an Impaired Water. If your authorization to discharge under this permit relied on Part 1.1.4.7 for a new discharge to an impaired water, you must implement and maintain any control measures or conditions on your site that enabled you to become eligible under Part 1.1.4.7, and modify such measures or conditions as necessary pursuant to any Part 3 corrective actions. You are also required to comply with Part 2.2.1 and the monitoring requirements of Parts 6.2.4.

2.2.3 Tier 2 Antidegradation Requirements for New or Increased Dischargers

If you are a new discharger, or an existing discharger required to notify EPA of an increased discharge consistent with Part 7.4 (i.e., a "planned changes" report), and you discharge directly to waters designated by a State or Tribe as Tier 2 or Tier 2.5 for antidegradation purposes under 40 CFR 131.12(a) (see list of Tier 2 and 2.5 waters on EPA's website at http://www.epa.gov/npdes/stormwater/msgp), EPA may notify you that additional analyses, control measures, or other permit conditions are necessary to comply with the applicable antidegradation requirements, or notify you that an individual permit application is necessary in accordance with Part 1.6.1.

2.3 Requirements Relating to Endangered Species and Historic Properties

If your eligibility under either Part 1.1.4.5 or Part 1.1.4.6 was made possible through your, or another operator's, agreement to include certain measures or prerequisite actions, or implement certain terms and conditions, you must comply with all such agreed-upon requirements to maintain eligibility under the MSGP.

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Comment ID: MSGP.0064.3
Author Name: Jack Lyman
Organization: Idaho Mining Association

3.Sections 1.4, 3.2.5 and 3.4. The proposed permit provisions regarding compliance with state water quality standards and TMDLs are unnecessarily complicated with no clear process to determine when a permittee is in compliance.

EPA Response
This permit is consistent with the CWA and its implementing regulations concerning water quality-based effluent limits in general and when there is an established TMDL. EPA believes that the general requirements stated in the permit are clear and will need to be implemented on a site specific basis taking into account the applicable water quality standards or TMDL is one is established.

Comment ID: MSGP.0065.4
Author Name: Keith E. Hanson
Organization: Minnesota Chamber of Commerce

Section 1.2.4.10 Stormwater Discharges Subject to Anti-Degradation Water Quality Standards
The Chamber supports EPA's removal of provisions that could have been interpreted to require individual anti-degradation review before a discharger could be eligible for coverage under the MSGP. Because anti-degradation issues are considered in issuing the general permit, additional analysis for every discharger covered under the permit is unnecessary. Such a requirement would be overly burdensome for dischargers and the Agency, and would negate the value of general permits.

EPA Response
EPA notes the commenter's support for the proposed provisions. No response is necessary.

Comment ID: MSGP.0072.13
Author Name: June Castelhano
Organization: Arizona Mining Association

Part 1.4: AMA questions what is meant by the language in the second sentence in this subpart that the permit sets "technology-based limitations in the form of Best Management Practices that apply to all pollutants"? The BMP approach in the stormwater