

Docket Number: 58-0102-1301

Effective Date: 6/4/14 (temporary rule) 2015 Sine die (pending rule)

Rules Title: Water Quality Standards

Agency Contact and Phone: Don Essig, 373-0119

Public Notice
Hearings: [] Yes [X] No
Locations and Dates: N/A
Written Comment Deadline: 1/3/14

Descriptive Summary of Rule as Initially Proposed: DEQ initiated this rulemaking docket in response to U.S. Environmental Protection Agency (EPA) disapproval of the water quality standards provision that exempts, from Tier II antidegradation review, those activities or discharges determined to be insignificant (*de minimus* exemption). This provision is set out in IDAPA 58.01.02.052.08.a. DEQ is also proposing to revise IDAPA 58.01.02.055, which addresses the treatment of water bodies that do not support designated beneficial uses. This section needs to be updated to ensure it is consistent with changes in the Idaho Code and other sections of the water quality standards that have been adopted since the adoption of Section 055. For example, Subsection 055.04, which was adopted in 1997, contains antidegradation provisions which have since been superseded by the antidegradation policy and implementation provisions contained in Idaho Code §39-3603 and IDAPA 58.01.02.051 and 052, which were adopted by the Idaho Board of Environmental Quality (Board) in 2010 and approved by the Idaho Legislature in 2011 (Docket No. 58-0102-1001).

Negotiated Rule Making: [X] Yes [] No

Sign-in sheets attached.

Costs To the Agency: None anticipated.

Costs To the Regulated Community: It is uncertain at this time what if any costs will be borne by the regulated community. There will likely be some increased costs to the regulated community but the extent and magnitude of those costs will depend on the form the final rule takes, particularly how much information it requires of those proposing to degrade water quality, and what if any changes in

In November 2010, antidegradation implementation procedures were adopted by the Board and then submitted to the 2011 Idaho Legislature for review (Docket No. 58-0102-1001). Under House Concurrent Resolution 16 (HCR16), the Idaho Legislature rejected certain portions of the rule and approved the remainder of the rule. The 2011 Idaho Legislature also adopted House Bill 153 (HB153) which revised the Idaho Code to include sections addressing the definition of degradation, the treatment of general permits, the identification of Tier II waters, and insignificant discharges or activities (codified at Idaho Code §§ 39-3601, 39-3602, 39-3603, and 39-3623). The new sections added to Idaho law by HB153 correspond to the portions of the rule rejected by HCR16.

Relevant Statutes: Chapters 1 and 36, Title 39, Idaho Code

In April 2011, DEQ submitted revisions to its water quality standards administrative rule (Docket No. 58-0102-1001) and corresponding revisions to the Idaho Code to EPA for review and action. In August 2011, EPA approved the revisions as submitted.

Idaho Code § 39-107D Statement: The standards included in this proposed rule are not broader in scope, nor more stringent, than federal regulations and do not regulate an activity not regulated by the federal government.

In November 2011, the Board adopted Docket No. 58-0102-1103, which included revisions to make the language on implementation of antidegradation procedures in Idaho's water quality standards complete and consistent with changes in state law brought about by the 2011 Legislature's passage of HB153.

Fiscal Impact Statement: The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year: Not applicable.

On February 14, 2012, Greater Yellowstone Coalition (GYC) brought an action in the U.S. District Court for the District of Idaho (Court) challenging EPA's approval of Idaho's definition of "degradation" of water quality and Idaho's mandatory exemption from review for *de minimus* levels of discharge. The *de minimus* exemption provided for an automatic exemption from Tier II antidegradation review if the added pollution from a new or increased activity would cause less than a 10% cumulative loss of a water body's assimilative capacity as of July 1, 2011. GYC argued that the *de minimus* exemption allows too much pollution. On April 24, 2013, the Court granted EPA's motion for remand of the *de minimus* issue and gave EPA 90 days to either 1) take a new action on the *de minimus* provision; or 2) inform the Court that it has determined not to take a new action, and to file a cross-motion for summary judgment and brief in support of that motion regarding the *de minimus* provision. The Court will retain jurisdiction to ensure a timely remand process and to allow the parties to challenge any new EPA decision in this case.

DEQ Recommendation: DEQ recommends that the Board adopt the rule, as presented in the final proposal, as temporary and pending with a temporary rule effective date of June 4, 2014 and the pending rule effective date coinciding with the adjournment *sine die* of the First Regular Session of the Sixty-third Idaho Legislature. The rule is subject to review by the Legislature before becoming final and effective.

On July 23, 2013, EPA disapproved the *de minimus* exemption. The Clean Water Act provides that if the state does not adopt changes in its rule to address the disapproval within 90 days, EPA shall promulgate a standard for the state. Pursuant to this section of the Clean Water Act, EPA may be required to promptly prepare a proposed rule for the state of Idaho. Adoption of this rule docket will avoid EPA promulgation.

Temporary Rule

- Necessary to protect public health, safety or welfare
- Compliance with deadlines in amendments to governing law or federal programs
- Conferring a benefit

Docket Number: 58-0102-1103

Section	Section Title	Summary of Rule Changes Based on Public Comment
052	Antidegradation Implementation.	This section has not been changed. See attached Response to Comments.
055	Water Quality Limited Waters and TMDLs.	This section has not been changed. See attached Response to Comments.

**Water Quality Standards
Docket No. 58-0102-1301
Response to Public Comments**

Comment	DEQ Response
<p><u>Andrea Santarsiere, Greater Yellowstone Coalition, 162 N. Woodruff Ave., Idaho Falls, ID 83401</u></p> <p>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.</p> <p>BACKGROUND</p> <p>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.</p> <p>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</p>	

Comment	DEQ Response
<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	

Comment	DEQ Response
<p>Comments on Final Proposed Rule</p> <p>Changes to Antidegradation Implementation Provisions</p> <p>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</p> <p>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.</p>	<p>The rule language as written is broad enough to address GYC's concerns and the character of the discharge and the magnitude of its effect on the receiving stream will allow DEQ, where appropriate, to consider the bioaccumulative nature of the discharge. Therefore, the additional language is unnecessary and has not been added to the rule.</p>

Comment	DEQ Response
<p>Changes to Water Quality Limited Waters and TMDLs Provisions</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>DEQ believes the language in Subsection 055.02.c. is accurate and appropriate to be included in this section.</p>

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1301

Meeting Date and Location: 8/28/13 - Coeur d'Alene, Idaho

Phone participation: AT&T call in number (505)242-2204/participant code 559169

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MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1301

Meeting Date and Location: 8/28/13 - Pocatello, Idaho

Phone participation: AT&T call in number (505)242-2204/participant code 559169

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MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1301

Meeting Date and Location: 8/28/13 – Boise, Idaho

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Boise 8/28/13

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Boise 8/28/13

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