

This document provides clarification on certain questions regarding implementation of Idaho's new antidegradation rule and statute

1. *To what activities is the antidegradation rule applicable?*

The antidegradation rule is applicable to all activities that require a federal license or permit and are subject to certification by the state under section 401 of the Clean Water Act (CWA). This is clearly stated in a number of rule provisions. Section 052.03 provides that review of degradation potential and application of the appropriate level of protection from degradation will be triggered by an application for a new or reissued permit or license. Permit or license is then defined as a permit or license for an activity that is subject to certification by the state under section 401 of the CWA, including, for example, NPDES permits, dredge and fill permits, and FERC licenses. In addition, the rule addresses the effect of an "activity" or "discharge" on water quality, and these terms are also defined by section 401 of the CWA. Section 010.01 defines activity as one that causes a discharge to a water subject to the jurisdiction of the CWA. Discharge is then defined for purposes of the antidegradation rule, as "'discharge' as used in section 401 of the CWA."

In response to comments during the rulemaking process, DEQ emphasized that the rule provisions cited above made the antidegradation rule applicable to any activity that is subject to certification under section 401 of the CWA. Thus, DEQ stated the following: "DEQ has tried to be clear that the antidegradation rule applies only to those activities that are subject to section 401 of the Clean Water Act. In some instances, for example FERC licenses, the activity results in a "discharge" as that term is used in section 401, yet is not a point source regulated by a NPDES permit. See, *S.D. Warren v. Maine*, 547 U.S. 370 (2006). In addition, the U.S. Supreme Court in *PUD No.1 of Jefferson County V. Washington*, 511 U.S. 700 (1994) made it clear that section 401 allows the state to impose conditions in its 401 certification that relate to the activity as a whole, not simply conditions that relate to the discharge that may result from the activity." See DEQ's response to comments by Alex LaBeau, at page 58.

There is nothing in HB 153 that changes the scope of the antidegradation rule. None of the rule sections cited above that explain the scope of the rule were modified by HB 153. While testifying regarding the definition of degradation in HB 153, Barry Burnell, DEQ's Water Quality Division Administrator, testified that the rule with the revised definition applies to those activities for which a 401 certification is required under the CWA: "Anti-degradation applies when the federal government issues a permit or license, as is the case with EPA's NPDES permits, the U.S. Army Corps of Engineers 404 dredge and fill permits and the FERC hydropower licenses and relicenses." Minutes from the Senate Resources and Environment Committee (March 7, 2011).

In sum, the antidegradation rule is applicable to any activity that requires a federal license or permit, and is subject to certification under section 401 of the CWA.

2. What discretion does DEQ's have in addressing antidegradation with respect to general permits?

The pending antidegradation rule included a section regarding general permits. This section was voided by HCR 16. HB 153, however, amended Idaho Code to address antidegradation and general permits. The applicable language in HB 153, codified at Idaho Code §39-3603(2)(a), reads as follows:

"For general permits issued on or after July 1, 2011, the department will conduct an antidegradation review, including any required Tier II analysis, at the time at which general permits are certified. For general permits that the department determines adequately address antidegradation, review of individual applications for coverage will not be required unless it is required by the general permit. For general permits that the department determines do not adequately address antidegradation, the department may conclude that other conditions, such as the submittal of additional information or individual certification at the time an application is submitted for coverage under a general permit, may be necessary in the general permit to provide reasonable assurance of compliance with the antidegradation policy. If supported by the permit record, the department may also presume that discharges authorized under a general permit are insignificant or that the pollution controls required in the general permit are the least degrading alternative as specified in the department's rules." Idaho Code § 39-3603(2)(a).

The statutory language provides that DEQ's antidegradation review will depend upon whether the general permit adequately addresses antidegradation. The statute also outlines some of the options available to DEQ when reviewing general permits. One of the options described in §39-3603(2)(a) is for DEQ to certify the general permit with conditions necessary to provide reasonable assurance of compliance with the antidegradation policy. This is consistent with §401 of the CWA. Under §401, a state may determine to grant, deny or waive certification. If the state provides a certification, it must include those conditions, if any, that are necessary to assure compliance with state WQS, including the antidegradation provisions in the WQS. 33 USCA 401(d); 40 CFR 124.53(e). Thus, under state and federal law, if DEQ determines the general permit does not contain provisions that assure compliance with the antidegradation policy, and DEQ determines to certify the permit, DEQ must include those conditions necessary to ensure compliance with the antidegradation provisions in the WQS.

Idaho Code §39-3603(2)(a) is clear that the options outlined in the statute are not exclusive. Thus, the statute provides that DEQ "may" include in its certification other conditions to ensure compliance with the antidegradation rule, and "may", if the record supports it, presume discharges are insignificant or that the least degrading alternative is required by the general permit. Therefore, DEQ has the discretion to take those actions it deems necessary, depending upon the specific general permit language it is reviewing. Such options include requiring additional conditions to ensure compliance with the antidegradation requirements as outlined in the statute, but also include other options such as denying or waiving certification.

3. Will DEQ Treat Aquatic Life and Recreational Uses Independently When Determining Tier 2 Protection?

Under the antidegradation rule, DEQ uses a water body by water body approach to determine where tier 2 protection applies, and relies upon the most recent federally approved integrated report (IR) and supporting data to make this determination. When determining the tier of protection to apply, DEQ treats recreational and aquatic life uses separately, so that a water body may be tier 1 for one use, but tier 2 for the other use. Idaho Code § 39-3603(2)(b)(iii), which was added by HB 153, makes this clear: "Water bodies identified in the integrated report as not fully supporting assessed uses will receive Tier 1 protection for the impaired aquatic life or recreational use, except as follows..."(emphasis added). Thus, only the impaired use receives tier 1 protection only, while the unimpaired use is provided tier 2 protection.

The reason for treating the uses separately was explained by DEQ in its response to comments on the draft rule: "First, water bodies can be listed as impaired for one use while still being high quality for another, e.g. recreation can be impaired due to presence of too high a bacteria count, not affecting aquatic life for which the water can still be of high quality. Similarly, a water body maybe listed as impaired due to exceedance of temperature criteria affecting aquatic life but having no affect on its high quality for recreation. This is why the rule looks at uses separately." Response to comments by Alan Prouty, at page 21.

Thus it is clear that DEQ will treat aquatic life and recreation uses independently and may determine that a given water is afforded Tier 1 protection for one use and Tier 2 for another.

4. What is the reason for allowing biology to trump listing for failure to meet criteria for dissolved oxygen, pH and temperature in determining whether Tier 2 protection is warranted?

Idaho code at §39-3603(2)(b)(ii) further refines the assignment of Tier 2 protection for aquatic life uses by allowing biological assessment to override failure to meet dissolved oxygen, pH or temperature criteria in determining a waterbody is of high quality. This is similar to the existing allowance in section 053.03 of Idaho's water quality standards.

The allowance stems from the knowledge that these three parameters are naturally occurring, always present characteristics of water that become a problem for aquatic life use when they are changed too much. Because they are naturally quite variable it is difficult to know when they have changed too much and difficult to specify criteria that are both protective and rarely if ever exceeded. The criteria specified in the water quality standards err on the side of protection and are therefore quite often exceeded naturally. A review of DEQ's biological assessments and the waters listed as impaired on the IR for a failure to meet criteria for dissolved oxygen, pH or temperature supports this conclusion. For example, the Lochsa River exceeds the temperature criteria for cold water aquatic life, and yet DEQ's biological assessment shows there is a healthy, balanced biological

community present and that the Lochsa is a high quality water for aquatic life uses. Therefore DEQ believes biological assessment rather than the specified criteria for dissolved oxygen, pH and temperature provides a more reliable indication that water is of high quality for aquatic life and should be protected as a Tier 2 water for aquatic life uses.