Docket Number: 58-0102-1001
Effective Date: 2011 Sine die
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: October 1, 2010

Negotiated Rule Making: [X] Yes [ ] No
Groups Involved: Sign-in sheets attached

Descriptive Summary of Rule as Initially Proposed: The Clean Water Act requires Idaho to protect the existing uses of all state waters and to protect high quality waters from degradation that, upon public review, is not necessary and important. This is known as antidegradation. Federal law requires the state to have both an antidegradation policy and methods to implement the policy. Although Idaho has an antidegradation policy in rule, there are no procedures in the rules on how to implement the antidegradation policy.

In September 2009, the U.S. Environmental Protection Agency (EPA) was given a 60-day notice of intent to sue by the Idaho Conservation League over EPA's failure, in oversight of Idaho's water quality rules, to require Idaho to identify its antidegradation implementation procedure. If Idaho does not act, EPA may be forced to act, and this may result in a federal rule requiring antidegradation review. DEQ initiated negotiated rulemaking in an effort to forestall the pending legal action against EPA that would force EPA to take action with respect to Idaho's rule. DEQ held six rulemaking meetings in developing this proposed rule and intends to develop supporting guidance.

DEQ proposes to revise its Water Quality Standards, IDAPA 58.01.02, to include procedures for implementing efforts to limit degradation of water quality. This proposed rule addresses:

1) Activities subject to antidegradation review;
2) Definition of degradation and the information needed to determine it;
3) How it is decided where each of the three levels of protection from degradation is applied;
4) Exemptions to antidegradation review;
5) Determination of insignificant discharges not warranting analysis of their degradation to high quality water;
6) How DEQ will evaluate changes in water quality;
7) Waste treatment alternatives analysis to identify least degrading option for significant degradation of high quality water;
8) Socioeconomic analysis needed to justify degradation of high quality water; and
9) What is needed to document existing sources of pollution are meeting required controls.

Two documents providing assistance in understanding and achieving compliance with the requirements of these rules are attached: "Antidegradation Implementation Scenarios" and "Examples of New and Increased Discharge."

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

Costs To the Agency: Additional costs to the agency are likely. The magnitude of the costs will depend in part upon the number, type and location of new or increased discharges that arise as well as details of the analysis and review required which are unknown until a final rule is agreed upon. These costs should consist only of staff time and will likely be absorbed by realignment of priorities.

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 what if any changes in treatment efforts to minimize degradation result from the application of the rule. There may also be some added costs in gathering required information.

Relevant Statutes: Sections 39-105, 39-107, and 39-3601 et seq., Idaho Code

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.

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 when the pending rule will become effective: Implementation of this rule is estimated to annually require 1.6 FTE DEQ staff time at a cost of approximately $145,500 in current dollars. In addition, one time startup costs for staff training are estimated to be about $16,500. The workload strategy at this time is for the DEQ regional office surface water quality staff assigned to conduct Clean Water Act Section 401 Water Quality Certifications to implement the antidegradation rules in coordination with a state office water quality standards staff person. Existing surface water quality work such as monitoring and assessments will be reduced in order to shift duties to antidegradation review and analysis.

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: 58-0102-1001

Section	Section Title	Summary of Rule Changes Based on Public Comment
010	**Definitions.**	This section has been changed. See attached Response to Comments.
051	**Antidegradation Policy.**	This section has not been changed. See attached Response to Comments.
052	**Implementation.**	This section has been changed. See attached Response to Comments.
~~052~~053	**Public Participation.**	No comments received. No change.
~~053~~054	**Beneficial Use Support Status.**	No comments received. No change.
~~054~~055 ~~055~~	**Water Quality Limited Waters and TMDLs.** ~~**Outstanding Resource Waters.**~~	No comments received. No change.
350	**Rules Governing Nonpoint Source Activities.**	No comments received. No change.

Antidegradation Implementation Scenarios

1. **New discharge or activity**
   a. If to a Tier I water body, then Tier I review (make sure WQ criteria are met).
   b. If to a Tier II (high quality) water body, then is discharge significant?
      i. if no, then Tier I review only.
      ii. if yes, then also Tier II analysis (make sure degradation is necessary to accommodate important economic or social development).

2. **Existing discharge or activity**
   a. If no change in permit levels, then antidegradation review complete with conclusion of no degradation.
   b. If increase in permit levels (either load or concentration), then
      i. If to a Tier I water body, Tier I review only.
      ii. If to a Tier II water body, then is discharge significant?
         1. if no, Tier I review only.
         2. if yes, then also a Tier II analysis.

3. **Water body classification**
   a. If water is listed in Category 1 or 2 of Integrated Report, then Tier II protection for all uses.
   b. If water is listed in Category 3 of Integrated Report, then case-by-case evaluation.
   c. If water is listed in Category 4 or 5 of Integrated Report
      i. Then for recreation uses, are criteria met?
         1. no, water is Tier I for recreation
         2. yes, water is Tier II for recreation
      ii. Then for aquatic life uses, is water listed for dissolved oxygen, pH, nutrients, sediment or temperature?
         1. no, water is Tier I for aquatic life
         2. yes, then does biological assessment show use is supported?
            a. no, water is Tier I for aquatic life
            b. yes, water is Tier II for aquatic life
            c. if no bioassessment data available, then case-by-case evaluation.

Integrated Report Categories

Integrated Report Category	Description
1	Waters[1] with all uses presumed to be supported. Presumption based on lack of pollution sources[2].
2	Waters for which all uses that have been assessed were found to be supported
3	Waters with no assessed uses due to lack of data
4a	Waters that have an EPA approved TMDL
4b	Waters with controls other than a TMDL expected to restore all uses to full support
4c	Waters for which lack of use support is caused by flow or habitat alteration which is not a pollutant
5[3]	Waters for which one or more uses are not supported, due to a pollutant.[4]

[1] The term 'waters' means an assessment unit (AU); a subdivision of the waterbody IDs in Idaho WQS.
[2] Presumption is based on these waters being located entirely within wilderness/roadless areas
[3] Category 5 is equivalent to the 303(d) list of impaired waters, a TMDL 'to do' list.
[4] While assessment is done by use, an AU is listed as impaired for a specific cause or pollutant. If any one water quality criterion is not met or use not supported based on biological assessment, the AU is listed in category 5, or 4c if cause is flow or habitat alteration. When a TMDL is completed the AU is listed in category 4a, for the pollutant for which the TMDL was done. Because listing as impaired and TMDL development is by pollutant a given AU can appear in both category 5 and 4.

Translation of Integrated Report Categories to Tiers of Antidegrdation Protection

Integrated Report Category	Antidegradation Tier
1	Tier II
2	Tier II
3	Tier I or II, as data shows at time of permitting
4a	Tier I for use that is impaired. Impairment based on bioassessment for aquatic life use. See 3.c.i and 3.c.ii from previous page.
4b	Same as 4a
4c	Tier II
5	Tier I for use that is impaired. Impairment based on bioassessment for aquatic life use. See 3.c.i and 3.c.ii from previous page.

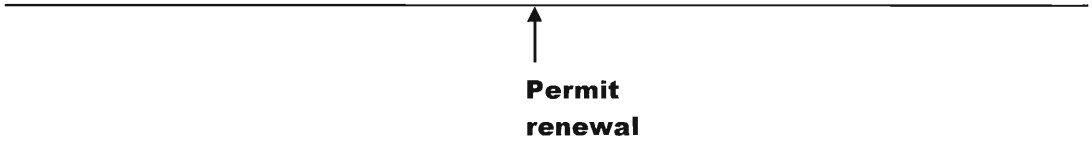
Tier II waters are called 'high quality' waters

Tier I waters are therefore waters that lack high quality

Examples of New and Increased Discharge.

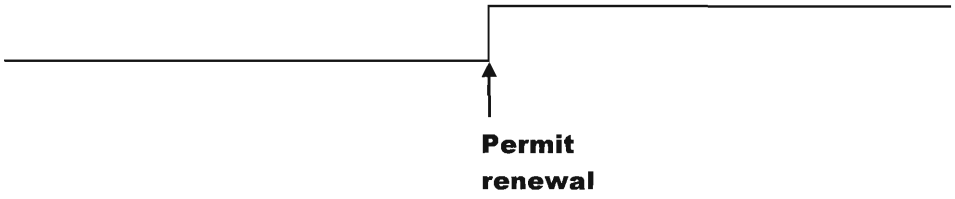
In each of the following examples the line represents the level of discharge with time, the beginning of the line indicates commencement of the discharge.

Discharge A – Existing permitted discharge, no increase



In this situation discharge does not increase with renewed permit thus there is no degradation of water quality. Discharge receives Tier I review only.

Discharge A2 – Existing permitted discharge, permitted discharge increases



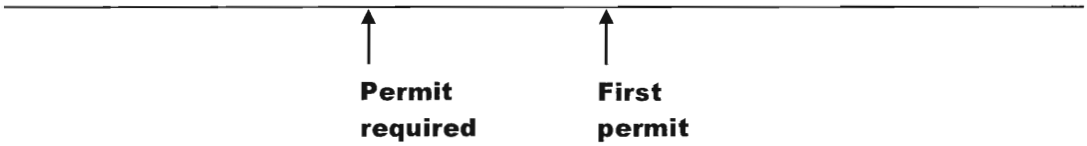
In this situation discharge increases with renewed permit thus there is degradation of water quality. IF this degradation is significant and of a Tier II water body, then there will be Tier II analysis in addition to Tier I review.

Discharge B – New permitted discharge

There will be degradation of water quality. IF this degradation is significant and of a Tier II water body, then there will be Tier II analysis in addition to Tier I review.

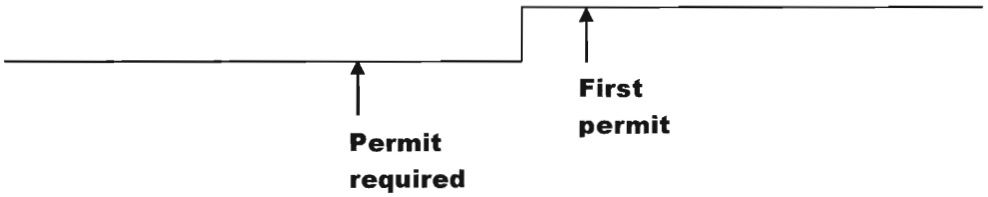
Examples of existing discharge without a permit

Discharge C – Change in regulation, existing discharge with no permit required when discharge commenced, no increase in discharge since permit required



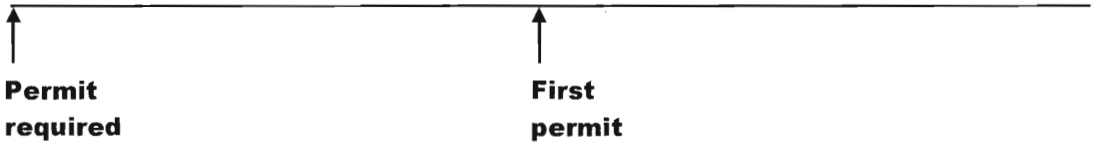
In this situation discharge does not increase with first permit thus there is no degradation of water quality. Discharge receives Tier I review only.

Discharge C2 – Change in regulation, existing discharge with no permit required when discharge commenced, discharges increases since permit required



In this situation discharge increases with first permit thus there is degradation of water quality. IF this degradation is significant and of a Tier II water body, then there will be Tier II analysis in addition to Tier I review.

Discharge D – Illegal discharge, existing discharge without required permit



In this situation a permit was required when the discharge commenced. When permitted for first time, this discharge will be treated as a new discharged (B above). Baseline will be water quality without discharge, i.e. upstream water quality. Thus there will be degradation of water quality. IF this degradation is significant and of a Tier II water body, then there will be Tier II analysis in addition to Tier I review.

Water Quality Standards
Docket No. 58-0102-1001
Response to Public Comments

Comment	DEQ Response
Christine Psyk, Associate Director, Office of Water and Watersheds, U.S. EPA Region 10 **Letter received September 9, 2010** The Environmental Protection Agency (EPA) commends the State of Idaho on its decision to work toward adoption of antidegradation implementation procedures; and, we appreciate the effort that the Idaho Department of Environmental Quality (IDEQ) has made in conjunction with interested stakeholders through its negotiated rulemaking process. Our understanding of the status of Idaho's rulemaking process is that IDEQ is soliciting public comment on a draft rule in September 2010; will forward a proposed rule to the Board of Environmental Quality in November 2010; and, if the Board adopts the proposed rule, it will be considered as a pending rule by the Idaho legislature in its 2011 session that extends from January 2011 to approximately April 2011. We want to emphasize the importance of Idaho moving forward in accordance with its current schedule to adopt antidegradation implementation procedures which are required under Clean Water Act regulations at 40 CFR 131.12. As you are aware, EPA is currently in litigation regarding the need for antidegradation implementation procedures in Idaho. In consideration of the State's ongoing rulemaking process, EPA has delayed taking action with respect to Idaho's antidegradation implementation procedures. EPA has been actively involved in the State's rulemaking process since its inception, attending negotiated rulemaking sessions and commenting on various drafts of the rule. EPA intends to continue its participation by commenting on the proposed rule as appropriate during the September 2010 public comment period. However, if the legislature does not adopt rules delineating antidegradation implementation procedures, and IDEQ does not submit those antidegradation implementation procedures to EPA for review and approval after the end of the 2011 legislative session, then EPA will consider its options available under the Clean Water Act (CWA), including issuing a determination under section 303(c)(4)(B) of the CWA. Such a determination would evaluate whether Idaho's antidegradation program is consistent with the requirements of the CWA. If EPA issued a determination that Idaho needs antidegradation implementation procedures, EPA would have an obligation to propose and promulgate any necessary procedures for the State if the State did not promptly do so. Please note that this letter does not constitute a determination pursuant to CWA section 303(c)(4)(B). It is also important that the antidegradation implementation procedures adopted by Idaho be consistent with the CWA and its implementing regulations. This includes the procedures being applicable to all "waters of the United States" in Idaho, and all activities that require a permit under federal law or a state certification pursuant to section 401 of the CWA (such as CWA Section 402 NPDES permits, CWA section 404 permits, and FERC licenses). Assuming Idaho is successful in adopting and submitting antidegradation	This comment is in support of initiation of this rulemaking and requires no response.

implementation procedures in accordance with its current schedule, EPA will carefully review them to ensure they are consistent with the CWA and its implementing regulations.	
Christine Psyk, Associate Director, Office of Water and Watersheds, U.S. EPA Region 10 **Letter received October 1, 2010** EPA appreciates the Idaho Department of Environmental Quality's (IDEQ) effort to develop antidegradation implementation procedures and this opportunity to provide comments on the proposed rule that was published for public comment on September 1, 2010. We appreciate that the proposed rule addresses a number of concerns raised in our comments of May 5, 2010 and July 28, 2010. Enclosed with this letter we are providing comments that recommend additional changes for your consideration as you prepare to submit the rule to the Idaho Board of Environmental Quality. Our comments today are organized along two areas: 1) areas that speak to major concerns where EPA approval is unlikely if those concerns are not addressed, and 2) areas where we believe it is important to clarify the rule. The major areas of concern involve Section 052.03 Emergency Actions, Section 052.07.a and b. Tier I Review, and Sections 052.08.d and 010.18 concerning the use of "measurable." In addition, for your consideration we comment on the potential impact of EPA's plan to revise the federal water quality standards regulation on IDEQ's proposed approach to determining when high quality water protection is provided (i.e., IDEQ's waterbody approach to Tier II implementation at Section 052.06). I would like to emphasize the importance of Idaho moving forward in accordance with its current schedule to adopt antidegradation implementation procedures that are consistent with the Clean Water Act and 40 CFR 131.12. We applaud and support your efforts as you go forward with the rule. As explained in our September 9,2010 letter, if IDEQ does not submit antidegradation implementation procedures to EPA for review and approval after the end of the 2011 legislative session, EPA will consider its options available under the Clean Water Act (CWA), including issuing a determination under Section 303(c)(4)(B) of the CWA. **Major Concerns** ► **052.03 Emergency Actions.** EPA has serious concerns that the proposed emergency actions provision provides an exemption to Idaho's antidegradation policy that is overly broad and could authorize water quality changes that permanently use all of a water's assimilative capacity and/or result in the loss of existing uses. The federal antidegradation policy at 40 CFR 131.12 does not provide regulatory authority for allowing such exemptions to existing use protection, or for permanent lowering of water quality without an antideg review. IDEQ could address EPA's concerns by limiting the provision to short term and temporary lowering of water quality that will not result in a loss of existing uses, as shown below. If EPA's concerns are not addressed, it is unlikely that EPA could approve section 052.03. "**03. Emergency Actions**. Nothing in the antidegradation policy is intended to apply to emergency response	Thanks for your voice of support. Based on EPA's concerns, DEQ will remove the emergency action provision. DEQ, however, believes this is a very narrow exemption as most emergency actions are done without a permit or license. In addition, there will most likely be little or no opportunity for DEQ review of most emergency actions. DEQ believes that the removal of this provision does not prevent DEQ from using its discretion when reviewing a permit or license to apply the antidegradation provisions in a manner which is appropriate given the circumstances presented by an emergency situation.

actions taken to protect human life or property, *provided that any lowering of water quality is short term and temporary and does not result in water quality lower than necessary to protect existing uses* ~~irrespective of any temporary or permanent change in water quality~~." ► **052.07.a and b. Tier I Review**. Section 052.07 of the proposed regulation includes the statement "existing uses and the water quality necessary to protect the existing uses must always be maintained and protected." This is consistent with Idaho's antidegradation policy at 051.01 and the federal regulation at 40 CFR 131.12(a)(1). However, EPA has serious concerns that subsections 052.07.a and b undermine the language at section 052.07 because the subsections are too narrow to ensure protection of existing uses in all cases. The language at subsection 052.07.a along with the new proposed regulatory definition of "assigned criteria" creates a presumption that the criteria in Idaho's water quality standards will ensure protection of all existing uses, and that Idaho's list of potential designated uses at section 100 covers all potential existing uses. EPA is concerned that this presumption may not be accurate in all cases. It is important that the antidegradation provisions provide for protection of existing uses that are not designated in Idaho's water quality standards, and provide for the possibility that the criteria in Idaho's standards may not always ensure the water quality necessary to protect all existing uses. Though written differently than subsection 052.07.a, subsection 052.07.b also seems to rely on the criteria in Idaho's water quality standards combined with the list of potential designated uses at section 100 to ensure protection of all existing uses. However, subsection 052.07.b refers to "beneficial uses" rather than existing beneficial uses. Idaho's water quality standards include a definition for beneficial use (010.06~~7~~) and it is unclear if it incorporates the regulatory definition of existing beneficial use (010.3~~2~~6). Thus it is unclear whether protection of beneficial uses will ensure protection of existing uses. IDEQ could address EPA's concerns by revising the rule, 1) to remove the presumption, 2) to explicitly state that in all cases, water quality better than that provided by Idaho's criteria will be ensured if necessary to protect existing uses, and 3) to refer to "existing beneficial uses" rather than "beneficial uses." EPA has suggested an approach that achieves this that combines 052.07.a and b, and preserves IDEQ's additional reference to compliance with the provisions of section 055 if a receiving water does not meet assigned criteria. However, EPA does not believe the reference to section 055 is relevant to the necessary existing use provisions. Alternatively, IDEQ could also address EPA's concerns by deleting subsections 052.07.a and b. If EPA's concerns are not addressed, it is unlikely that EPA could approve 052.07.a and b. **"052.07. Tier I Review**. Tier I review will be performed for all new or reissued permits or licenses. Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected. No degradation of water quality may be allowed that would cause or contribute to violation of water quality criteria.	DEQ does not believe there is anything in sections 052.07a & b that undermines the opening statement. Rather, these sections merely address the two possibilities that can be encountered: a) water meets all criteria or b) water does not. The Idaho WQS already have substantive language at 055 addressing the latter situation, and it seemed prudent to make the link. DEQ agrees to delete these two sections from the rule. EPA needs to realize, however, that as a practical matter DEQ will not be able to create use categories or criteria in the context of antidegradation review. If EPA believes Idaho's list of uses in section 100 of our WQS does not cover all existing uses, then DEQ would appreciate help in identification of uses that are not covered and assistance with the resources to develop criteria that would apply to them. DEQ asks this because DEQ believes antidegradation review must be based on defined choices, not ethereal 'what ifs'. If EPA believes Idaho's current suite of uses and criteria associated with those uses is inadequate then EPA should address that through an Administrator's determination, clearly identifying the uses and criteria EPA finds are missing. Under Idaho WQS designated and existing uses are a subset of the more general term beneficial uses, so when used without qualification beneficial uses means both designated and existing uses.

a. *In all cases, whether* ~~If~~ a receiving water does not meet assigned criteria, *or a receiving water meets or surpasses assigned criteria,* ~~then~~ the Department shall ensure that an activity or discharge authorized by a new or reissued permit or license meets criteria adopted *and any better water quality that may be necessary* to protect and maintain existing beneficial uses. *If a receiving water does not meet assigned criteria, then the Department* ~~and~~ shall *also* ensure that the activity or discharge complies with the provisions of Section 055 of these rules. ~~In making this determination, the Department shall rely upon the presumption that, if the numeric criteria established to protect specific uses are met, then the existing beneficial uses they were designed to protect are protected.~~ ~~**b.** If a receiving water meets or surpasses assigned criteria, then no change to an existing activity or discharge or commencement of a new activity or discharge may be allowed that would degrade ambient water quality so that it violates criteria established to protect beneficial uses."~~	
Whether IDEQ chooses to revise or delete subsections 052.07.a and b, language should be added that identifies the process IDEQ will use to identify existing uses and the water quality necessary for their protection. An approach to this is suggested below: "*Identification of existing uses and the water quality necessary for their protection shall be based on all available water quality-related information, including any water quality-related data and information submitted during the public comment period for the permit or license*."	DEQ agrees to add this language.
► **052.08.d and 010.18., "Measurable."** The "measurable change" provision at section 052.08.d and the definition of "Degradation or Lower Water Quality" at section 010.18 provide that a change in water quality must be measurable to be considered degradation/a lowering of water quality. The use of measurable affects the application of Idaho's Tier 2 and Tier 3 provisions because both are triggered by actions that cause "degradation" (see sections 052.09 and 052.10.g). EPA has serious concerns that the application of measurable acts as a de facto de minimis provision, without a cumulative cap. Proposed new or increased activities and discharges would avoid a Tier 2 analysis when the calculated change in water quality would not be considered measurable, without the calculated change being considered in the Tier 2 de minimis provision at 052.09.a. Similarly, new or increased point sources, and any associated lowering of water quality that was not considered measurable, could be allowed in Tier 3 waters without meeting the otherwise applicable offset requirements. De minimis lowering of water quality is not authorized by the federal Tier 3 policy at 40 CFR 131.12(a)(3). Furthermore, an un-measurable change could be greater than de minimis, even of a magnitude that impairs uses. EPA appreciates that to address this situation IDEQ added to the proposed definition of measurable the statement, "Because the Department recognizes that in some cases smaller changes may be significant to human health or aquatic life protection, the Department will in those cases consider calculated changes to be measurable." However, there is no indication as to when IDEQ would definitely use this clause, and most importantly here, it does not address the broader concerns discussed above for sections 052.08.d and 010.18.	DEQ agrees to delete measurable from the definition. DEQ is also pursuing changes to the definition of lower water quality in Idaho statute to ensure the statute and rule are consistent. It is inconceivable to us that there would be a series of un-measurable changes that would not eventually trip our significance thresholds in 052.09a. Therefore EPA's concern over a lack of a cumulative cap on measurable is in our opinion misplaced.

IDEQ could address EPA's concerns by deleting section 052.08.d and removing "measurable" from the proposed definition of "Degradation or Lower Water Quality," as shown below. For proposed new or increased activities and discharges, IDEQ should use the calculated change in water quality when implementing Tier 2 and Tier 3. If EPA's concerns are not addressed, it is unlikely that EPA could approve sections 052.08.d and 010.18. "~~**052.08.d.** Measurable change. If a calculated change is not measurable, then it will be evaluated as no change.~~" "**010.18. Degradation or Lower Water Quality**. For purposes of antidegradation review, degradation or lower water quality means a change in concentration of a pollutant that is ~~measurable and~~ adverse to beneficial uses that may be made of the water, as calculated upon appropriate mixing of the discharge and receiving water." **Additional Clarifications and Comments** ► **010.18. Degradation or Lower Water Quality. (adverse to beneficial uses)**. EPA suggests that IDEQ either delete "adverse to beneficial uses" from the definition of "Degradation or Lower Water Quality," or add a statement clarifying IDEQ's interpretation of "adverse." It is important that a proposed lowering of water quality need not be of a degree that would impair uses to be given appropriate consideration under IDEQ's antidegradation policy and implementation procedures. This is relevant to Tier 2 and Tier 3 which in accordance with the federal antidegradation policy address protection of water quality that is better than necessary to protect uses (40 CFR 131.12(a)(2)) and prohibit (with limited short term and temporary exception) lowering of water quality in Outstanding National Resource Waters (40 CFR 131.12(a)(3)). We believe our suggested wording presented below is consistent with interpretations IDEQ has already made with regard to the meaning of "adverse" as used in this context (personal communication; IDEQ's letter to EPA explaining its "Special Resource Waters" rule, Burnell to Jennings, 8/3/07; and Interim Antidegradation Review Guidelines for Idaho, version 1, 5/18/10, posted on IDEQ's website 5/19/10). Such a clarification in rule would avoid potential ambiguity when interpreting the "Degradation or Lower Water Quality" definition. "**18. Degradation or Lower Water Quality**. For purposes of antidegradation review, degradation or lower water quality means a change in concentration of a pollutant that is ~~measurable and~~ adverse to beneficial uses that may be made of the water, as calculated upon appropriate mixing of the discharge and receiving water. *'Adverse to beneficial uses' simply means that the quality of water is worsening*." [Note that this includes the deletion of "measurable and" in accordance with the comment above.] or, "**18. Degradation or Lower Water Quality**. For purposes of antidegradation review, degradation or lower water quality means a change in concentration of a pollutant ~~that is measurable and adverse to beneficial~~	DEQ believes this suggested change is unnecessary. DEQ agrees completely that "lowering of water quality" need not be of a degree that would violate criteria in order to be given appropriate consideration under DEQ's antidegradation policy. Such an interpretation would completely obfuscate Tier II and Tier III protection.

~~uses that may be made of the water~~ *resulting in worsening water quality*, as calculated upon appropriate mixing of the discharge and receiving water."	
► **010.45. Highest Statutory and Regulatory Requirements for Point Sources**. EPA suggests the addition of language to the definition of "Highest Statutory and Regulatory Requirements for Point Sources" to clarify the meaning of "It also includes any compliance schedules or consent orders." EPA understands that the inclusion of "It also includes any compliance schedules or consent orders" at 010.45 is to allow recognition of enforceable actions to bring point sources into compliance with the Clean Water Act, in the assessment of whether 052.09(b) of the proposed regulation is satisfied. Section 052.09(b) provides that "In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the watershed the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source controls," and reflects a requirement of 40 CFR 131.12(a)(2). To clarify the intent of the reference to compliance schedules or consent orders, EPA suggests the additional language presented below.	DEQ agrees to make this change.
"**45. Highest Statutory and Regulatory Requirements for Point Sources**. All applicable effluent limits required by the Clean Water Act and other permit conditions. It also includes any compliance schedules or consent orders *requiring measures to achieve applicable effluent limits and other permit conditions required by the Clean Water Act*."	
► **052. 02. Restoration Projects**. It is important that "where determined necessary" is properly implemented to avoid unnecessary lowering of water quality during restoration projects. As shown below, EPA suggests addition of a statement, "Restoration projects shall implement reasonable pollution control measures." EPA reads "changes in water quality," combined with "to secure long term improvement," to mean that any lowering of water quality during restoration activities would be temporary with a net result being improvement in water quality (not lowering). Nevertheless, this provision should not alleviate the need to implement appropriate measures to avoid or minimize temporary lowering of water quality. Our suggestion is intended to clarify this.	
"**02. Restoration Projects**. Changes in water quality may be allowed by the Department without an antidegradation review where determined necessary to secure long-term water quality improvement through restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished. *Restoration projects shall implement reasonable pollution control measures.*"	DEQ agrees that appropriate best management practices should be used in connection with restoration projects, and has changed the rule accordingly.
► **052.04 General Permits.** It is important that general permits, like individual permits, adequately address antidegradation. In the sentence at section 052.04 that begins "For general permits that do not adequately address antidegradation, the Department may conclude …" (emphasis added), EPA suggests that IDEQ clarify that it will take action as necessary to adequately address antidegradation. We interpret "may" to	DEQ intended this language to indicate that DEQ would take action as necessary to ensure antidegradation is adequately addressed. EPA's rewrite does make our intent more clear, and DEQ agrees to include the language

mean that IDEQ has options, and suggest that the language be clarified by presenting those options. An approach to this is presented below. "**04. General Permits**. For general permits issued on or after July 1, 2011, the Department will conduct antidegradation review, including a Tier II analysis, at the time at which general permits are certified. For general permits that 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 do not adequately address antidegradation, *the Department shall ensure that antidegradation is adequately addressed. To achieve this* 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, are ~~may be~~ necessary in the general permit to provide reasonable assurance of compliance with the antidegradation policy*; may require an individual permit; or may deny certification*."	suggested. DEQ does not, however, agree with EPA's attempt to identify all choices DEQ has to respond to antidegradation in connection with a general permit. An attempt to describe all options may in fact result in limiting available options. Section 401 authorizes DEQ to respond to a federal permit or license in a number of different ways. The current language describes possible options, but in no way does this language affect the state's authority to respond in different ways, including without limitation, denying or waiving certification.
► **052.06. Identification of Tier I and Tier II Waters.** Idaho's proposed approach to determining when Tier 2 protection will be provided is "waterbody by waterbody." We would like to ensure that IDEQ is aware that EPA has received substantial comments concerning the scope and protectiveness of the waterbody approach to Tier 2. These comments are being considered as EPA evaluates potential revisions to the federal water quality standards regulation. With the relative timing of Idaho's rule process and EPA's expected proposal of revisions to its water quality standards rule, it is possible that EPA would not be in a position to approve Idaho's waterbody approach when adopted. Adopting the parameter by parameter approach to Tier 2 review would strengthen Idaho's antidegradation procedures, and would reduce the potential risk that IDEQ might need to revise its rule in the future.	DEQ hopes EPA will continue to communicate and make its likely path forward on this matter clear.
► **052.08. Evaluation of Effect of an Activity or Discharge on Water Quality**. As IDEQ has already done in other sections of the proposed regulation, EPA suggests that IDEQ add a provision to 052.08 that recognizes IDEQ's ability to request additional information where adequate data are not already available to make informed decisions. For example, such a provision could be important when implementing 052.08.a.i "Current Discharge Quality" if there is a proposal to increase the discharge of a parameter that has not been previously monitored. Previously collected discharge monitoring data "collected within five years of the application for a permit or license" would not provide information to characterize current discharge quality in that case. We suggest that the italicized and underlined language presented below either be added as a new section at 052.08.a, or, at a minimum, added to 052.08.a.i as follows. "**i.** Current Discharge Quality. For parameters of concern that are currently limited, current discharge quality shall be based on limits in the current permit or license. For parameters of concern not currently limited, current discharge quality shall be based on available discharge quality data collected within five years of the application for a permit or license. *The department may require additional information from the applicant, including data from additional discharge monitoring, as necessary to evaluate the effect of an activity or discharge on water quality.*"	DEQ has simplified this to addition of "other appropriate data" consistent with subsequent subsections. DEQ expects that discharge monitoring reports and permit applications should provide adequate data to conduct an antidegradation review and hopes to coordinate with EPA in permit writing to assure that is the case.

► **052.09.a and c Tier II Analysis**. To ensure consistency in the use of "activities or discharges," as opposed to "discharge," we suggest the edits presented below. "**09. Tier II Analysis** A Tier II analysis will only be conducted for activities or discharges, subject to a permit or a license, that cause degradation. The Department may allow significant degradation of surface water quality that is better than criteria only if it is determined to be necessary to accommodate important economic or social development in the area in which the waters are located. The process and standard for this determination are set forth below. **a.** Insignificant *Activity or* Discharge. The Department shall consider the size and character of *an activity or* a discharge or the magnitude of its effect on the receiving stream and may determine that it is insignificant. If *an activity or* a discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections 052.09.b., 052.09.c., and 052.09.d., shall be required. **i.** In no case will the Department determine insignificance when the proposed change in *an activity or* discharge, from conditions as of July 1, 2011, will: (1) Increase ambient concentrations by more than ten percent (10%); or (2) Cumulatively decrease assimilative capacity by more than ten percent (10%). **ii.** The Department reserves the right to request additional information from the applicant in making a determination a proposed change in *an activity or* discharge is insignificant....	DEQ agrees the addition of reference to activities as well as discharges through this section adds clarity and consistency to the rule.
c. Alternatives Analysis. Degradation will be deemed necessary only if there are no reasonable alternatives to *conducting an activity or* discharging at the levels proposed. The applicant seeking authorization to degrade high water quality must provide an analysis of alternatives aimed at selecting the best combination of site, structural, managerial and treatment approaches that can be reasonably implemented to avoid or minimize the degradation of water quality. To identify the least degrading alternative that is reasonable, the following principles shall be followed:"	DEQ agrees to this change.
► **052.09.c.iv.3 Alternatives analysis.** EPA suggests revision to the language at 09.c.iv.3 as shown below to clarify that "economically justified," as used in that section, is in the context of economic considerations related to possible alternatives to lowering water quality, not whether the project would provided for important economic development as is considered at 09.d. Because in accordance with 40 CFR 131.12(a)(2) degradation is not to be allowed unless it is associated with important social or economical development, it is possible that even the most degrading alternative might be argued to be economically justified, even if a less degrading alternative was feasible, reasonable, and would still provide for the economic development. That, however, would be contrary to the reason for doing the alternatives analysis, which is to identify	DEQ believes EPA's suggestion would actually blur the clear distinction we now have between alternatives analysis (AA) and socioeconomic justification (SEJ) and puts more emphasis on economic justification. DEQ has added "... based on (1) and (2) above" to make our intent here clear, i.e. that economic justification here is specific to discharge alternatives. This will be made even clearer in the guidance.

alternatives that would eliminate, or at least minimize, degradation associated with projects that would provide important economic or social development. "iv. In selecting the preferred alternative the applicant shall:...(3) Select the least degrading option or show that a more degrading alternative is environmentally *justified,* or economically justified *based on cost considerations for the alternatives*."	
Mark Benson, Vice President Public Affairs, Potlatch Corporation Potlatch Corporation (Potlatch) submits the following comments to the subject proposed rule. Potlatch is a forest land management company which owns and manages approximately 820,000 acres of forest land in Idaho. As such, forestry activities on Potlatch's lands are subject to applicable requirements under the Idaho Forest Practices Act (FPA). Practices implemented under the FPA are designed to protect water quality and to minimize any degradation. Accordingly we support the recognition in the proposed rule that practices under the FPA are "cost effective and reasonable BMPs for nonpoint sources." We have also reviewed the joint letter from IACI and IMA and support the comments therein. However, Potlatch would like to emphasize a few issues in the proposed rule that are particularly important to Potlatch. 1. Existing Permits and Activities. We appreciate IDEO's recognition in the Rule that the anti-degradation analysis be confined to new and increased discharges that exceed significant thresholds above baseline conditions. Accordingly, existing activities and discharges are considered part of the baseline conditions in the water body. We believe this approach is in keeping with the requirements of the Clean Water Act, EPA guidance as well as judicial cases interpreting anti-degradation requirements. However, as you may be aware there have been some recent decisions from federal appellate courts concerning forestry type activities which may now require an NPDES Permit although EPA rules had specifically exempted such activities from obtaining a NPDES Permit in the past. Until these decisions are either clarified by the United States Supreme Court or by Congress, there is continued uncertainty in the forestry industry as to the scope of these decisions. We believe it would be inequitable and unfair to treat these activities which may now be subject to a NPDES Permit as a "new permit" or "license" under the proposed rule. This is particularly so when the forestry activities and implementation of the associated best management practices occurred many years ago consistent with FPA practices and in reliance upon EPA rules. In these instances it is appropriate to treat such activities as part of the baseline conditions and not as new permits. Therefore we strongly support clarifying the definition of "existing activity or discharge" to address this issue. 2. General Permits. To the extent Potlatch may be required to obtain Clean Water Act permits in the future, it appears likely that such permits would be in the form of a general permit issued by either EPA or the U.S. Army Corps of Engineers. The point of general permits is to create a streamlined process to obtain permit coverage quickly and with certainty of the particular permit requirements. We are concerned that the	DEQ is aware of the 9th Circuit Court of Appeals stormwater decision regarding treating channelized runoff from forest roads as a point source. DEQ has made changes to its definitions to address this decision and recognize as existing actions that did not require a permit or license in the past. DEQ fully intends to work closely with permitting agencies on general permits to assure they meet antidegradation requirements and do so expeditiously.

antidegradation review may substantially delay or even preclude the ability of a company to obtain coverage under general permits. Accordingly, we urge IDEQ to work closely with the permitting federal agencies to ensure that before general permits are issued all antidegradation requirements are satisfied. It appears that the EPA and Corps permit process already ensures that anti-degradation is satisfied in terms of ensuring only insignificant impacts occur, ensuring that the least degrading pollution control alternative is implemented, and that all decisions are made in a public process thereby ensuring that all appropriate socio-economic issues are properly considered. Accordingly we support any presumptions IDEQ could legitimately include in the rule to allow for streamlined anti-degradation review during the issuance of a general permit.	DEQ doesn't believe it is possible to categorically presume all generals permits will adequately address antidegradation, and have in fact found that some currently effective permits have not. DEQ is unable to presume general permits will meet antidegradation requirements because DEQ does not know what types of activities will be covered under general permits, DEQ does not know what future permit conditions will be, and DEQ does not have permitting authority. West Virginia recently attempted to exempt certain general permits from the Tier II antidegradation review process. EPA's approval of these exemptions was challenged and U.S. District Court held that EPA's approval was arbitrary and capricious. Ohio Valley Environmental Coalition v. Horinko, 279 F.Supp.2d 732, 757-762 (S.D.W.Va.2003). See also, Kentucky Waterways Alliance v. Johnson, 540 F.3d 466 (6th Circuit 2008) (Court overturned exemption of general storm water permits because there was no showing the discharges under the permit would be de minimus).
3. 303(d) Waters and Tier II Waters. We believe that only water bodies that meet all water quality standards should be candidates for Tier II protection under the proposed rule. It does not make sense to treat a water body as "impaired" for purposes of 303(d) listing and to adopt a different definition of "impairment" for purposes of identifying a Tier II water as is suggested in the proposed rule. There may be some water bodies that are fully meeting all beneficial uses and are only on the 303(d) list because an applicable criterion for the water body is not being met. This would suggest the applicable criteria for the particular water body is over protective or unnecessary. We believe the appropriate way to address these situations would be for IDEQ to first remove the water body from the 303(d) list or, if necessary, adopt more appropriate criteria before the water body should be treated as a Tier II water under anti-degradation implementation procedures.	The 303(d) list identifies a waterbody and the cause of impairment, usually a pollutant. When a waterbody is listed as impaired for pollutant X that restricts only further discharge of that pollutant, not discharge of other pollutants for which the waterbody is not impaired. To be consistent, antidegradation should recognize water quality better than criteria for pollutants that are not the cause of the impairment. A criterion not being met indicates only that, not total collapse of the use it is intended to protect. Therefore, DEQ believes it is counter to the purpose of antidegradation to protect from degradation only water that meets all criteria and DEQ has opted to give more weight to DEQ's bioassessment protocols in determining whether a water body is of high quality.

4. Special Resource Waters (SRWs). It is not clear to us why IDEQ is not addressing SRWs in the subject proposed rule. Clearly SRWs have always been part of Idaho's anti-degradation policy. The proposed rule is a significant state rule implementing all aspects of Idaho's anti-degradation policy. It does not seem logical to ignore SRWs. We agree with the joint comments of IACI/IMA that SRWs should be addressed in the proposed rule and that these waters should be treated like all other waters for purposes of anti-degradation implementation. Namely that SRWs which meet all water quality standards should be Tier II waters and SRWs that are not meeting standards should be Tier I waters.	DEQ attempted to address SRWs in this rulemaking but pulled back when it was suggested that SRWs be done away with and replaced with three tiers of antidegradation specified by federal rule. The existing rule language on SRWs does not fit neatly within any of the federally defined levels of protection; therefore, DEQ believes a longer rulemaking negotiation is needed to discuss the re-designation of all the water bodies currently designates as SRWs.
Liz Paul, Boise River Campaign Coordinator, Idaho Rivers United Please accept these comments from Idaho Rivers United. Idaho Rivers United is a non-profit river conservation organization dedicated to protecting and restoring the rivers of Idaho. Based in Boise, Idaho Rivers United has 3,500 members. "Antidegration is an integral part of a state's or tribe's water quality standards, as it provides important protections that are critical to the fulfillment of the Clean Water Act objective: to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Ephraim S. King Definitions: **59. Measurable** The definition is vague. "Smaller changes" should be clarified. It should mean changes that are not measurable as defined in the 2nd sentence. There is ambiguity in the 2nd sentence from the use of the term "generally." Words like "generally" don't work well in definitions. Exceptions should be spelled out with as much specificity as possible. The Department can reserve the right to consider calculated changes measurable in cases where changes that cannot be determined with 95% confidence are found to be significant to human health or aquatic life protection.	DEQ has decided to delete measurable from the definition and is pursuing changes to the definition of lower water quality in Idaho statute to ensure the statute and rule are consistent.
Antidegradation Policy **051.** **01.** Existing use as defined at 010.36 is a use that was attained "on or after November 28, 1975." If the phrase "existing in stream water use" means "existing use" as defined, for clarity it should be replaced with the defined term, "existing use." If it means something different, it should be replaced with the defined term "existing use" to properly protect the water.	DEQ intends the phrase existing in stream water uses to be the same as the defined term existing use. This is language that is currently in the water quality standards, and DEQ agreed in the rulemaking to keep the existing language.
04. Assigned Criteria. When are criteria assigned to protect a water body and why? How are the assigned criteria associated with the designated uses, the presumed uses and any existing uses?	Associated may be a better term, but assigned criteria means the criteria in Sections 200 through 253 of the water quality standards that are associated with the beneficial

052. Implementation **01.** The Department should not maintain a list of Tier I or Tier II waters.	uses.
03. Any action, emergency or otherwise, that requires a new or reissued permit or license, should be subject to antidegradation review.	DEQ respectfully disagrees, but has removed the Emergency Action provision. See response comments by Harv Forsgren, USDA Forest Service and Christine Psyk, EPA Region 10 regarding emergency actions.
04. What does "adequately address antidegradation mean"? For Tier II waters, it should mean "to maintain and protect high quality waters and not to allow for any degradation beyond a de minimis level without having made a demonstration, with opportunity for public input, that such a lowering is necessary and important." The Department should establish the authority to conduct an antidegradation review or require submittal of additional information or individual certification if it is determined that the general permit does not provide the aforementioned protection.	Adequately addressing antidegradation will be a judgment call by DEQ in its review of general permits. DEQ believes the proposed language, along with DEQ's 401 certification authority, allows DEQ to "require submittal of additional information or individual certification" to meet the requirements of antidegradation Tiers I & II.
06. Identification of Tier I and Tier II Waters The Department should insure that water bodies are appropriately classified as Tier I or Tier II in order to properly review all pollutants that would enter the water from the new or reissued permit (and use assimilative capacity). Impairment in the receiving water should not allow exploitation of any of the water's assimilative capacity without Tier II review. All existing assimilative capacity must be preserved unless it is proven that degradation is necessary and important. This can be done in a number of different ways using either the waterbody-by-waterbody or parameter-by-parameter approach. The approach identified in section 06. would allow loss of assimilative capacity without Tier II review.	DEQ agrees that all pollutants that may cause degradation must be considered in the antidegradation review and that is DEQ's intent. However, DEQ has chosen an approach to classifying the tier of protection waters will receive that will allow loss of assimilative capacity in waters identified for only Tier I protection without a Tier II analysis of necessity and importance of degradation. This approach is consistent with the federal antidegradation requirements.
06. b. The type, quantity and quality of the available information that will be acceptable should be spelled out. The existing language allows the decision to be made based on inadequate, out-of-date, and/or biased information. In addition, there needs to be direction given on what will be done when enough, qualified information is not available at the time of the proposal. How will the needed information be collected to ensure the water body is classified appropriately?	DEQ would make a concerted effort to base decisions on adequate, current information and would always avoid information that is biased. DEQ intends to use the most recent information available, no older than 5 years if possible, and will make every effort to get adequate information on which to judge a water body's quality. This will be more fully addressed in guidance.
06.c. Can a water body be identified as a Tier I water for for aquatic life uses and Tier II for recreational uses or vice-versa?	Yes.

06.c.i.(3) Same as response to 06.**b**.	Same as response to 06.b.
06.c.ii. What level of protection does the water body receive if water quality data does not show impairment for recreational uses, and what if there is not enough data to determine impairment for recreational uses?	If recreational use is not impaired then the waterbody will get Tier II protection of recreation. If there is not enough data DEQ will seek the data needed to make a determination.
07. Tier I Review **a.** Three terms are used, "assigned criteria," "criteria (adopted)," and "numeric criteria." Clarification would enhance the applicability of this section. This should apply to only the assigned criteria that are not being met. Given that the receiving water could meet other assigned criteria, available assimilative capacity for any given pollutant should always be subject to Tier II protection, regardless of whether the criteria for other pollutants is satisfied	DEQ has removed sections 052.07.a & b from the proposed rule in favor of addressing the ideas these two sections addressed in guidance.
b. The water body should be reviewed under Tier II if the receiving water meets or surpasses assigned criteria.	
Available assimilative capacity for any given pollutant should be subject to Tier II protection, regardless of whether the criteria for other pollutants are satisfied. All existing assimilative capacity must be preserved unless it is proven that degradation is necessary and important. No change should be allowed to degrade ambient water quality without a Tier II review.	Understood. Under the waterbody by waterbody approach DEQ has proposed waters that are given Tier 1 protection could have many qualities that meet criteria that would not be subject to Tier II analysis.
08. Evaluation of Effect... This does not adequately account for the non-static nature of water quality. What if there are major pollution discharge violations in the receiving water – so the existing water quality is really bad. Then the polluter gets packed off to jail and the existing water quality improves dramatically. The determination of improvement, no change or degradation could change. How will that Department make sure that the objectives of the Clean Water Act are still being met. Can you reopen the antidegradation review?	If there are major pollution discharge violations then other sources are not being controlled as they should and further degradation could not be allowed (section 052.09b of proposed rule). If this occurs after an antideg review has been completed this is a matter of enforcement of permit conditions.
c. Offsets should be upstream of the degradation in water quality due to the proposed activity or discharge. Offsets should not be granted for actions that are already required in 09.**b**.	The rule requires offsets be upstream of the degradation they counteract. Offsets do not apply to other controls that are required.
d. Measurable has a special definition in these rules and it would be clearer if this read, "measurable, as defined in this rule" or whatever the appropriate technicaleese is.	DEQ has decided to modify the rule such that this definition is no longer needed.

09. Tier II Analysis Exploitation of less than 10% of the water bodies' assimilative capacity may, in some cases, be significant. The Department must be authorized to prohibit discharges that cause or contribute to the exploitation of less than 10% of the assimilative capacity. The applicant must provide the information required by the Department to correctly judge the significance of the activity or discharge.	The proposed rule couples a 10% proportion of ambient water quality with a cumulative cap of no more than 10% of the assimilative capacity in determining whether a discharge is insignificant. DEQ believes there is support for the conclusion that the changes in water quality set out in the rule are in fact insignificant.
b. The Department must ensure that other source controls are achieved before allowing any degradation of high water quality.	DEQ disagrees. The courts have allowed that if a discharge or activity is deemed insignificant, the requirements of Tier II antidegrdation may be set aside.
c. The Department must ensure that there are no reasonable alternatives to discharging at a level which causes degradation. The objective is to avoid the degradation not reduce it. The alternatives analysis must be expected to examine all strategies to avoid the degradation, and only if these are not available consider strategies that would reduce the degradation.	DEQ agrees the objective is to avoid degradation; however, DEQ believes the reality is that some degradation can be justified as necessary to accommodate important economic or social development. Overall, implementation of the antidegradation policy minimizes degradation but does not prohibit it if the appropriate showing is made.
iii. The Department must be authorized to require the applicant to examine specific alternatives or provide additional information to conduct the analysis. iv.(2) The applicant must consider the environmental costs and benefits across media and between pollutants.	DEQ agrees.
Harv Forsgren, R4 Intermountain Regional Forester, and Leslie Weldon, Regional Forester, USDA Forest Service We wish to thank you for incorporating several of our previous comments into the Proposed Draft Idaho Antidegradation Rule (proposed rule 58-0102-1001). This once again demonstrates our excellent working relationships with IDEQ staff. Since our last comments, recent developments have created new concerns regarding this process that we would like to share. The first is regarding the recent 9th Circuit Court of Appeals stormwater decision (*NEDC v. Brown,* No. 07-35266, 9th Cir. 2010). This legal decision may affect the Draft Antidegradation Rule review process your agency is proposing. For example, some Forest Service drainage structures that collect overland flow and which drain into jurisdictional water bodies may now be considered by some to constitute a point source of pollution. We request a discussion with IDEQ as to how this legal decision changes the scope of the draft Antidegredation Rule with regard to forest roads. Because this decision would affect all landowners we	DEQ agrees that under the 9th Circuit decision some forest road runoff is likely to require NPDES permitting in the near future. See response to comments by Mr. Mark Benson, Potlatch Corporation regarding existing permits and activities. DEQ is willing to work with you and others to discuss

suggest that IDEQ convene a workshop for forest road managers from all ownerships to discuss this issue. The second concern relates to comments made by the Environmental Protection Agency (EPA) in a July 28, 2010, letter on the Draft Antidegredation Rule. In section 051-06 Emergency Actions, EPA suggests changing the existing provision to "emergency actions and their impacts with regard to any degradation of water quality be addressed through enforcement discretion." This language would expose emergency responders who need to quickly conduct activities such as unplugging culverts during flood events, building firelines, or installing debris torrent deflectors to protect structures following wildfires, with the possibility that an EPA enforcement official may make a discretionary call as to the legality of such actions. We feel this subjective standard would be unacceptable as it would expose such responder's emergency actions, necessary to protect life and property, to "after the fact" second guessing. Accordingly, should this language be adopted it might cause responders to delay needed actions until they knew for certain whether EPA considered them appropriate. It is likely that this would reduce the ability for timely response and result in increased property damage or loss of life. We suggest keeping IDEQ's existing language as presented in the latest Draft Rule.	implications of *NEDC v. Brown* and how DEQ proceeds to address antidegradation in light of that decision. DEQ has dropped the provision exempting emergency actions from antidegradation review. Few emergency actions require a permit or license and thus trigger antidegradation review, and where a permit or license is needed DEQ would exercise due discretion in the antidegradation review. See response to comments by Christine Psyk, US EPA Region 10 regarding emergency actions.
Michael Fuss, P.E., Public Works Director, City of Nampa The City of Nampa is the second largest municipality in Idaho and in the Treasure Valley. The City has long been a strong supporter of improving the environment as witnessed by having the first municipal wastewater treatment plant in the valley. This plant currently treats the largest population equivalent load in the state. As such, our plant removes more biochemical oxygen demand than any other domestic plant. Nampa has a substantial interest in the protection of human health and the environment. The City has been actively involved in the development of the proposed rule and supports the State of Idaho developing antidegradation procedures that meet the Clean Water Act requirements. As a member of the Association of Idaho Cities (AIC), we fully support the AIC letter of comment on this rule. In particular, the City of Nampa wants to express its support to two items in the AIC letter. In the proposed rule, the Department of Environmental Quality (DEQ) modified wording of paragraph 52.08.c (page 460) that discusses offsets. The proposed wording of the rule is *"These offsets in pollution must be upstream of the degradation in water quality due to the proposed activity or discharge and occur before the activity or discharge is allowed to begin."* This wording will allow the City of Nampa to trade with another site (Dixie Drain for instance) for any additional phosphorus removal. This will allow the various dischargers with more flexibility to effectively meet the cost requirements and also to improve the overall water quality of the Boise River. Also, we strongly support the AIC comment on Identifying Tier I and Tier II waters. We recommend that	Thank you. DEQ concurs that properly crafted offsets, as described in the proposed rule language, can foster creative, cost effective solutions to improving overall water quality. It would be difficult and prohibitively time consuming to determine the appropriate tier of antidegradation protection

DEQ include a list of Tier I and II waters in the guidance document. For a discharger to not know if the receiving stream is Tier I or II prior to beginning its study means that much work could be done on the wrong assumption. For example, the preliminary list of Tier I streams that was prepared by DEQ does not include lower Indian Creek. This meant that the lower Indian Creek was a Tier II stream with its additional requirements. However, DEQ is preparing a Total Maximum Daily Load on lower Indian Creek due to biological impacts, which means that it should be listed as a Tier I water body. The City of Nampa is pleased to participate in this important rulemaking and appreciates DEQ's efforts to include all the stakeholders in the process.	for every water body in Idaho. DEQ believes it is doable and reasonable to create a list that would identify the Tier of protection for the limited list of water for which there are current NPDES permitted discharges and plans to do so as an Appendix to a guidance document under preparation. Any list DEQ creates will be subject to change as the data and assessments of water quality status for the Integrated Report changes.
Alan Prouty, Vice President, Environmental and Regulatory Affairs, J.R. Simplot Company The J.R. Simplot Company (Simplot) offers these comments on the Proposed Rule Docket No. 58.0102-1001 Antidegradation Policy Implementation. Simplot has numerous facilities in Idaho engaged in food processing, fertilizer manufacturing, mining, and other agriculture-related operations. Some of these operations have NPDES permits, stormwater permits or discharge to municipalities that do have discharge permits. Thus, Simplot has a direct interest in the proposed Antidegradation Policy Implementation. Representatives from the J.R. Simplot Company have been a part of various trade associations (Idaho Association of Commerce and Industry, Idaho Mining Association and Northwest Food Producers Association) who have been involved in the development of this proposed rule. As comments from these trade associations state, this proposed rule will have a significant effect on the Clean Water Act permitting in Idaho. The ability to obtain wastewater permits in a timely and reasonable manner is very important to adapt to changing business conditions and needs. It is important to have antigradation policy implementation procedures that achieve the needed environmental protection yet provide a predictable, practicable regulatory process. Simplot has the following commitments on the proposed rule to achieve these objectives. **1. Identification of Tier I and Tier II Waters** A core element of the antidegradation procedures is the identification of Tier I and Tier II waters.[1] The proposed rule allows for waters that do not support beneficial uses to be classified as Tier II waters if certain biological criteria are met. Also, the proposed rule does not provide for DEQ listing Tier I and II waters. Simplot believes that the antidegradation program should: (1) Use existing regulatory structures as much as possible, (2) make use of existing assessment determinations and (3) provide a regulatory process that is clear as to how it works and what is required of the regulatory community. [1] Tier III waters are identified by statute. 1A. Classification of "Waters": Impairment vs. Beneficial Uses The water quality program has its foundation in the establishment of various beneficial uses and then	DEQ agrees, and believes its approach to determining Tier I and II waters meets these goals. If specific criteria are not met, the water body considered to not fully support its beneficial use(s) and is identified as

establishes the criteria (numeric and narrative criteria) to determine whether or not those uses are being met. The most common ones for Idaho waters are cold-water biota and recreation contact (either primary or secondary). If water quality data shows that the numeric and/or narrative criteria are not being met, then it is determined that such a water is not meeting specific beneficial uses and a regulatory process is started to restore the beneficial uses. The proposed antidegradation rule introduces a new definition in the classification of waters by using the term "impairment."	impaired for that parameter/pollutant. This queues the water body up for a TMDL to address the causative pollutant(s) and restore the water to a condition of meeting all criteria. Idaho's Integrated Report does not list use impairments.
010.49. Impairment. a. For the purpose of determining the appropriate level of antidegradation protection, impairment means: i. For aquatic life uses, that two or more major biological groups such as fish, macroinvertebrates, or algae have been modified by human activities significantly beyond the natural range of the reference streams or conditions approved by the Director in consultation with the appropriate basin advisory group; and ii. For recreational uses, non-compliance with those levels of water quality listed in Sections 200, 210, 251, and 275 (where applicable). b. The Department shall utilize the current version of the "Water Body Assessment Guidance" as published by the Idaho Department of Environmental Quality, as a guide to assist in making impairment decisions.	Impaired or impairment is not currently defined in Idaho's water quality standards, though it is a term widely used in the connection with 303(d) list. DEQ disagrees that the use of biological data to determine the health of a water body is inconsistent with existing water quality programs or introduces a new concept. The importance of biological data in determining the overall health of a water body is recognized in Idaho Code and the existing WQS. Indeed, DEQ's evaluation of whether a water body may be considered high quality for aquatic life uses directly from the existing definition of full support in the WQS.
This proposed definition of impairment in the draft rule allows a water segment that is not meeting beneficial use(s) to be classified as "not impaired" for the purposes of antidegradation, thus it could be classified as a Tier II water. Tier II waters are defined as following: "Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water. ..." [IDAPA 58.01.02.051.02]	DEQ recognizes water bodies are listed as impaired for specific pollutants/parameters and that water can be impaired for a specific pollutant but still have high quality water in many other respects.
The antidegradation procedures need to work with existing water quality and permit programs rather than add new definitions which will create additional "process" driven requirements. Reasons for why this is problematic from a regulatory and permitting perspectives include:	The difficulty DEQ has run into is in trying to force the pollutant by pollutant approach used in Integrated Reporting and implementation of most other Clean Water Act programs to match up with a waterbody by waterbody approach in implementation of antidegradation and it is a poor fit.
First, the proposed rule elevates "biological data" as being the arbitrator whether or not a water body is a Tier I or Tier II water. Simplot 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. Clearly, EPA does not use biological assessment data to remove a water segment from a 303(d) listing. It is	There are regulatory and technical reasons for DEQ's approach to classifying water bodies for antidegradation purposes. A water body by water body approach, which Simplot and other entities strongly support, is intended to classify a water body based upon its overall water quality.

not clear why biological data should be used for changing determinations for "antidegradation" determinations but cannot be used for 303(d) listing purposes. DEQ has not provided any technical or regulatory justification for this approach.	This contrasts with a pollutant by pollutant approach that applies a different tier of antidegradation depending upon whether a particular pollutant violates criteria. The pollutant by pollutant approach is similar to the way the 303(d) list works, because the 303(d) list depends not upon the overall quality of a water body, but instead upon whether a particular pollutant violates criteria. Therefore, making decisions regarding the tier a water body belongs in based solely upon the 303(d) list best fits with a pollutant by pollutant approach, but is not consistent with the water body by water body approach. Simplot's adherence to the 303(d) list is inconsistent with its position that a water body by water body approach should be used.
Second, it is not clear what is the process for determining how the biological data, for a water segment that is not meeting beneficial uses, shows that such a water segment is not "impaired." Such a determination may require new data and studies. This is very problematic for a permittee who is trying to get a new or expanded permit. The regulatory process needs to be straightforward and predictable; otherwise it becomes very difficult for the regulated community to implement projects. This definition of impairment adds considerable uncertainty and complexity to the permitting process.	DEQ believes that the bioassessment of a water body best reflects the overall water quality for support of aquatic life uses, consistent with a water body by water body approach to antidegradation. A water body can be impaired, i.e. fail to meet criteria, for one or more pollutants and still be biologically healthy, supporting its aquatic life use and have many aspects of high water quality. The 303(d) list, on the other hand, does not indicate overall lack of high water quality nor that uses are not supported; it only indicates that pollutant-specific criteria are not being met. DEQ's rule language is fully consistent with the requirements of antidegradation and is most consistent with the water body by water body approach urged by Simplot and many others.
Finally, the proposed rule creates a "double" definition that raises the issue of the appropriateness of criteria and designated beneficial uses. If the biological data show no "impairment", thon it raises the issue of whether the criteria for aquatic life uses are appropriate.[2]	DEQ has removed the definition of impairment. However, DEQ believes there is a big difference between not fully supporting uses (failure to meet any one of many criteria that apply) and low quality water, perhaps akin to the difference between not feeling well but still going to work and being bed-ridden or in the hospital unable to work.

[2]The State of Oregon requires that waterbodies must have water quality that meets or is better than all water quality criteria in order to be classified as High Quality Waters (HQW). Thus, Simplot's recommendation is consistent with an approach taken by other states.	While Oregon does require all criteria be met to classify a water as Tier II, or high quality, it is important to also recognize that Oregon does an elaborate pollutant by pollutant analysis of waters it classifies as Tier I (see diagram page 12 of "Antidegradation Policy Implementation Internal Management Directive for NPDES Permits and Section 401 Water Quality Certifications."). Oregon requires an analysis of socioeconomic benefits and environmental costs for both high quality waters (Tier II) and water quality limited waters (Tier I).
Simplot recommends the deletion of the "impairment." ~~010.49. Impairment.~~ ~~a. For the purpose of determining the appropriate level of antidegradation protection, impairment means:~~ ~~i. For aquatic life uses, that two or more major biological groups such fish, macroinvertebrates, or algae have been modified by human activities significantly beyond the natural range of the reference streas or conditions approved by the Director in consultation with the appropriate basin advisory group; and~~ ~~ii. For recreational uses, non compliance with those levels of water quality listed in Sections 200,210,251, and 275 (where applicable).~~ ~~b. The Department shall utilize the current version of the "Water Body Assessment Guidance" as published by the Idaho Department of Environmental Quality, as a guide to assist in making impairment decisions.~~	DEQ has removed this definition from the proposed rule.
1B. Non-Assessed Waters The proposed rule states that waters that have not been assessed in the Integrated Report will be "provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license." As stated earlier in this comment letter, one the major concerns with this rulemaking is the creation of a cumbersome regulatory processes that will result in resource intensive administrative processes. It is not clear at all how such a determination will be made including what information will be needed to make such a determination. Simplot recommends that for such waters that they be classified as Tier I waters unless there is data that shows that classification as Tier II is warranted. Such unassessed waters cannot be identified as Tier II water as *there is* no *data to support such* a *determination.* Tier I designation 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.	Tier I does not provide protection from degradation of water quality that is better than criteria. Presuming waters for which there is no information about their quality deserve only Tier I protection is inconsistent with the purpose of antidegradation. Instead, as Simplot is suggesting, when there is a lack of data, the proposed rule provides that DEQ's determination will be based upon the collection of such data.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **052.06. Identification of Tier I and II Waters.** The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows. b. Water bodies identified in the Integrated Report as not assessed will be provided Tier I ~~an appropriate~~ level of protection on a case by case until basis using information is available to determine whether assessed uses are fully supported. ~~at the time of a proposal for a new or reissued permit or license.~~	
1C. Identification of Tier I and II Waters Needs to be Integrated with Current Assessment Program Simplot believes very strongly that the antidegradation program needs to be integrated with the existing water quality "assessment" program. DEQ already has a very well established process for classifying all waters in the State of Idaho. This system utilizes the following classification system.	DEQ agrees, and tried to do so with its initial proposal of a pollutant by pollutant approach to antidegradation that would have lined up cleanly with the Integrated Report and specifically category 5 'impaired waters' which employs a pollutant by pollutant approach. Category 5 of the Integrated Report, also known as the 303(d) list, identifies a waterbody and the cause of impairment, usually a pollutant. When a waterbody is listed as impaired for pollutant X that restricts only further discharge of that pollutant, not discharge of other pollutants for which the waterbody is not impaired. So, while one might refer to waters on the 303(d) list as "impaired," their status of compliance with water quality standards is actually assessed parameter by parameter. Any given water can be impaired for one or more pollutants and not impaired, i.e., in attainment, for other parameters. To be consistent with implementation of 303(d), antidegradation should be applied parameter by parameter and thus recognize that there is water quality better than criteria in 303(d) listed waters for pollutants that are not the cause of the impairment. While there is certainly simplicity in equating 303(d) impaired water with lack of high quality water that is

Table 1
Water Segment Classification (*)

Category	Subcategory	Description
1		Water quality standards are presumed to be met.
2		Waters fully support the beneficial uses that have been assessed; not all beneficial uses have been assessed.
3		Insufficient data to determine if beneficial uses are being attained.
4		Waters that do not meet a standard for one or more beneficial uses.
	4a	Waters that have a TMDL completed and approved by EPA.
	4b	Waters with pollution control requirements placed on them and expected to attain the standard in a reasonable period of time.
	4c	Waters for which the standard not being achieved is not caused by a pollutant.
5		Waters that do not meet the water quality standards for one or more beneficial uses due to one or more pollutants.

(*) The *Integrated Report* refers to "waters" as assessment units. In these comments, the term "water segments" is used to refer to the same designation.

DEQ publishes every two years an update classifying water segments (assessment units) in the state according to these categories. From Simplot's perspective, using these categories to help determine Tier I and II waters would seem to be a very logical and practical method. Table 2 shows how these categories could be used to determine Tier I or Tier II status.

Table 2
Utilization of Water Categorization for Antidegradation Tiers

Integrated Report Category	Antidegradation Tier
1	Tier II
2	Tier II
3	Tier I initially. Can be Tier II if data becomes available to support designation.
4a	Tier I. ~~Can be Tier II if there is evidence that the standard is not being met due to natural causes.~~
4b	Tier.
4c	Tier I. Can be Tier II if there is evidence that the standard is not being met due to natural causes.
5	Tier I

simply not the case.

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.

Second, in determining whether a water body is fully supporting its beneficial uses the multiple criteria that apply are treated independently. This independent applicability means that if any one of several measures of water quality is not met, e.g. numeric criteria and biological metrics, a water body is considered not fully supporting its beneficial use and impaired for a specific cause(s), usually a pollutant.

This is a conservative approach that directs water quality improvement efforts at water bodies that are not meeting all their criteria.

Finally, there are numerous water bodies that DEQ believes most Idahoans would consider high quality but that fail to meet one or two criteria. While these waters fail to meet some criteria, though usually not by much, and are thus listed as impaired they are biologically healthy. Examples include the Lochsa River, Upper NF Clearwater River, South Fork Payette River, and Middle Fork Salmon. DEQ is required to identify their failure to meet the criteria in our integrated reporting, but DEQ does not believe they are overall of low quality. It would be inappropriate to apply only Tier 1 protection to such waters and ignore their overall high quality.

There are several advantages to using this system. First, it uses fully the data from the assessment program for the antidegradation policy implementation procedures. There are no "duplicative definitions" or regulatory processes. Second, the preparation of the Integrated Report provides the opportunity for public comment, including the submittal of data showing whether beneficial uses are being attained or not. Finally, this category list clearly shows what waters are Tier I and what waters are Tier II, thus helping the regulated community know before initiating a project what the regulatory requirements will be. Finally, the proposed rule does not address Special Resource Waters (SRW). Simplot recommends that each SRW be evaluated and managed for antidegradation purposes the same as any other water segment in Idaho.	Identification as impaired for 303(d) purposes and lack of high quality water for antidegradation purposes do not match up as simply as Simplot would have it.
Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **052.06. Identification of Tier I and II Waters.** The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows. a. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as fully supporting assessed uses (Categories 1 and 2) will be provided Tier II protection. b. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as not assessed (Category 3) will be provided Tier I ~~an appropriate~~ level of protection ~~on a case by case~~ until ~~basis using~~ information is available to determine whether assessed uses are supported. ~~at the time of a proposal for a new or reissued permit or license.~~ c. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as not supporting an assessed use (Categories 4a, 4b, 4c and 5) will receive Tier I protection unless the water bodies in Category 4c do not meet beneficial uses solely due to natural conditions. Such water bodies shall be identified in the Integrated Report and be approved by the Board of Environmental Quality. ~~as follows:~~ ~~i. For aquatic life uses, if biological data show:~~ ~~(1) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~ ~~(2) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~	DEQ did not incorporate the changes suggested by Simplot for reasons stated above. DEQ has modified this section of rule in response to comments. See response to comments by Alex LaBeau, Idaho Association of Commerce and Industry and Jack Lyman, Idaho Mining Association regarding Identification of Tier I and Tier II Waters.

~~(3) If biological data are insufficient to determine impairment, then the water body will be provided an appropriate level of protection on a case by case basis using information available at the time of a proposal for a new or reissued permit or license.~~ ~~ii. For recreational uses, if water quality data show impairment, then the water body shall receive Tier I protection for recreational uses.~~	
1D. List of Waters Protected The proposed rule has the Department not maintaining a list of Tier I or II waters. From an implementation viewpoint, not having such as list will make it more difficult for the regulated community to plan and prepare for the regulatory process of getting a new permit or renewed NPDES permit. Simplot recommends that DEQ maintain a list of Tier I and II waters. Such a list is very helpful for the regulated community to understand what the regulatory requirements (and process) may be for getting an approval for a new or expanded discharge. Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **052.01. List of Waters Protected.** All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a water body by water body approach during the antidegradation review. The Department will ~~not~~ maintain a list of Tier I or II waters. Waters given Tier III protection are designated in law.	DEQ can provide a list of selected waters and their proposed antidegradation tier assignment. See response to Michael Fuss, City of Nampa and Ken Harward, Association of Idaho Cities regarding identifying Tier I and Tier II waters.
2. Insignificant Discharges Having a provision for insignificant discharges is very important to the regulated community as it provides that resources of both the regulated community and DEQ are focused on *significant* discharges in terms of the evaluation of antidegradation. Thus, insignificant discharges should be not subject to Tier II analysis. The *insignificant discharges* portion of the rule should be placed in 052.08 Evaluation of Effect of an Activity or Discharge on Water Quality. Also, the criteria should just be "increase ambient concentrations by more than 10 percent." Determining assimilative capacity can be (for some contaminants) more difficult to determine with certainty as compared to calculating ambient concentrations. Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **052.~~09.a.~~ 08.e. Insignificant Discharge.** The Department shall consider the size and character of a discharge or the magnitude of its effect on the receiving stream and may determine that it is insignificant. If a discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections 052.09.b., 052.09.c., and 052.02.d., shall be required.	DEQ agrees this is an important provision. DEQ sees no benefit to relocating the passage in the rule to section 052.08. Although DEQ believes a percentage of ambient quality will be easier to implement than assimilative capacity for some contaminants (e.g. those with narrative criteria), basing insignificance on ambient quality alone could allow changes in water quality that would exceed criteria to be deemed insignificant and will not be sufficient to meet EPA approval. The rule must also have a cumulative cap.

i. In no case will the Department determine insignificance when the proposed change in the discharge, from conditions as of July 1, 2011 will: ~~(1) Increase~~ increase ambient concentrations by more than ten percent (10%); ~~or~~ ~~(2) Cumulatively decrease assimilative capacity by more than ten percent (10%).~~ ii. The Department reserves the right to request additional information from the applicant in making a determination a proposed change in discharge is insignificant.	
3. Restoration Projects The "definition" of what are restoration projects needs to be clarified to include CERCLA or other administrative consent or voluntary orders. These type of projects are common, especially in relationship to landscape projects (mining related projects). Subjecting such projects to antidegradation review would add an unnecessary administrative step that would further delay actual "improvements on the ground. Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **052.02. Restoration Projects.** Changes in water quality may be allowed by the Department without an antidegradation review where determined necessary to secure long-term water quality improvement through restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished. Such changes include approved mining reclamation plans. and actions taken under CERCLA. 42 USC § 9601 et seq. or state administrative or voluntary orders.	Typically there are no federal permits or licenses involved in CERCLA actions, so the antidegradation review would not be triggered, and therefore, this language is not necessary. Also while DEQ may be able to say some CERCLA projects are restoration projects, DEQ cannot say that any action taken under CERCLA, a state administrative or voluntary consent order constitutes a restoration project.
4. Alternatives Analysis and Socioeconomic Justification The alternatives analysis in the proposed rule (052.09.c.) is essentially a top-down control technology requirement. There is no requirement in Idaho's statutes or rules for using such an approach. The Idaho antidegradation policy implementation procedure needs to have factors that provide information that enable an economic evaluation of alternatives so that comparisons can be done for similar situations. Such information is needed to determine what is reasonable. Specific information that needs to be included in such an analysis includes: (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 OPTWs or public water supply projects;	Alternatives analysis is to determine if degradation is necessary before allowing degradation of Tier II water, as is required by federal regulation, Idaho Statute, and the current policy in the WQS. The steps DEQ has proposed in rule have that aim. DEQ expects this analysis of alternatives to be very project specific and unlikely to require for most projects much more than what is currently done. DEQ does believe that the point of the rule, and the principles in section 052.09.c as proposed, are to have an eye on ways to minimize degradation of water quality. DEQ believes the five economic factors suggested by Simplot would take the aim off of ways to minimize

(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 conservations alternatives. These are very important factors that need to be considered in the alternative analysis and they need to be included in the alternatives analysis. The proposed Idaho rule is very prescriptive for both the alternatives analysis and socioeconomic justification; the result will be a very resource intensive study of the proposed project and potential impacts not unlike a Environmental Impact Statement required under the National Environmental Policy Act. Simplot believes that the language in the antidegradation policy implementation procedure needs more flexibility so that the alternatives analysis and socioeconomic justification can match the complexity of the project and potential changes in water quality. The portion of the Colorado antidegradation regulation for alternatives analysis and socio economic justification provides such flexibility. Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough): **c. Alternatives Analysis.** ~~Degradation will be deemed necessary only if there are no reasonable alternatives to discharging at the levels proposed.~~ The applicant seeking authorization to degrade high water quality must provide an analysis of alternatives ~~aimed at selecting the best combination of site, structural, managerial and treatment approaches~~ that can be reasonably implemented to avoid or minimize the degradation of water quality. To identify the least degrading alternative that is reasonable, the following ~~principles~~ factors shall be ~~followed~~ considered: i. ~~Controls to avoid or minimize degradation should be considered at the earliest possible stage of project design.~~ An assessment to 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. This assessment should include: ii. ~~Alternatives that must be evaluated include (where appropriate), but are not limited to:~~	degradation. DEQ believes and intends that the language proposed at 052.09.c.iv.(3) "Select the least degrading option or show that a more degrading alternative is environmentally or economically justified." allows for the factoring in of economic viability, once the alternatives to avoid degradation are indentified. Simplot's proposed changes would turn alternatives analysis into a comparison of profitability among competitors that would have little if anything to do with minimizing degradation of water quality, and thus in DEQ's estimation would not be consistent with showing necessity of degrading water quality. While cost is certainly a factor, and the rule provides for consideration of relative treatment costs of alternatives for a proposed activity or discharge, DEQ does not believe all degradation would be necessary just because it would be more profitable to do so. While the rule is detailed, it does so with the intent of being descriptive not prescriptive.

~~(1) Relocation or configuration of outfall or diffuser;~~ ~~(2) Process changes/improved efficiency that reduces pollutant discharge.~~ ~~(3) Seasonal discharge to avoid critical time periods for water quality;~~ ~~(4) Non-discharge alternatives such as land application; and~~ ~~(5) Offsets to the activity or discharge's effect on water quality,~~ (1) Whether the costs of the alternative significantly exceed the costs of the proposal; (2) 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 OPTWs or public water supply projects; (3) 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); (4) 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: (5) The relative, long-term, energy costs and commitments and availability of energy conservations alternatives. ~~iii.~~ ii. The Department retains the discretion to require the applicant to examine specific alternatives or provide additional information to conduct the analysis. iv. ~~In selecting the preferred alternative the applicant shall:~~ ~~(1) Rank all technologyically feasible treatment alternatives by their cost effectiveness at pollutant reduction;~~ ~~(2) Consider the environmental costs and benefits across media and between pollutants; and~~ ~~(3) Select the least degrading option or show that a more degrading alternative is environmentally or economically justified.~~ ~~iii. 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 water and (B) are determined to be economically, environmentally, and technologically reasonable.~~ **d. Socioeconomic Justification.** Degradation of water quality deemed necessary must also be determined by the Department to accommodate important economic or social development. ~~Therefore the applicant seeking authorization to degrade water quality must at a minimum identify the important economic or social development for which lowering water quality is necessary and should use the~~ The following factors ~~steps~~ will be considered for ~~to demonstrate~~ this determination: i. Identify the affected community or area.	These factors seem to be aimed at socio-economic justification rather than alternatives to minimize degradation, and in DEQ's view would make alternatives analysis very similar to socio-economic justification. This strikeout language for iii is not in the proposed rule. Maybe something Simplot was proposing?

ii. Describe the important social or economic development associated with the activity. iii. Identify the relevant social, economic, and environmental health benefits and costs associated with the proposed degradation in water quality for the preferred alternative. Benefits and costs that ~~must~~ may be analyzed include, but are not limited to: (1) Economic benefits to the community such as changes in employment, household incomes and tax base; (2) Provision of necessary services to the community. ~~(3) Potential health impacts related to the proposed activity;~~ ~~(4)~~ (3) Impacts to direct and indirect uses associated with high quality water, e.g. fishing, recreation, and tourism; and ~~(5)~~ (4) Retention of assimilative capacity for future activities or discharges. iv. Factors identified in the socioeconomic justification should be quantified whenever possible but for those factors that cannot be quantified a qualitative description of the impacts may be accepted; and v. If the Department determines that more information is required, then the Department may require the applicant to provide further information or seek additional sources of information.	DEQ believes consideration of health impact to the community is a legitimate concern of and factor for the community in their assessment of the importance of a project.
5. Summary. 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. We appreciate the Department's consideration of these comments.	DEQ agrees that the level of review should be commensurate with potential impact of the project on the environment and point out that the rule as written would not subject existing discharges that do not increase significantly to a Tier II analysis.
Ken Harward, Executive Director, Association of Idaho Cities The Association of Idaho Cities (AIC) was founded in 1947 as a nonpartisan, nonprofit corporation, owned, organized, and operated by Idaho's city governments. AIC represents over 200 Idaho cities before the Idaho State Legislature and the U.S. Congress and provides regular training to city officials on budgeting, open meeting laws, ethics, Idaho Code, environmental regulations, elections, and planning and zoning issues.	

AIC has a substantial interest in the protection of human health and the environment, particularly related to Clean Water Act implementation. Municipalities have contributed substantially to the success of the Clean Water Act in Idaho and to improved water quality in the state. Municipalities anticipate a continuing role in successful implementation of current and future Clean Water Act requirements. Idaho municipalities, as the primary funders of waste water and storm water infrastructure, also have substantial interest in the cost and environmentally effective delivery of waste water and storm water services. AIC supports the State developing and adopting antidegradation implementation procedures that fully meet Clean Water Act requirements and is pleased to participate in this important rulemaking concerning development of antidegradation implementation procedures for Idaho to meet the requirements of the Clean Water Act.. First, AIC appreciates the substantial and substantive work that DEQ has invested in this rule-making process to date. The many white papers that DEQ has developed have been very useful, as was the data analyses related to ways to classify waters as Tier I or Tier II based on biological information. We also appreciate DEQ's receptiveness to making changes to the rule in response to verbal and written comments provided by AIC and other participants in the rulemaking process. In particular, AIC supports the following important changes that have occurred to the draft rule to date: • Use of a Water body by Water body approach (AIC still has concerns with some of the current rule language, as described below) • Addition of reference to section 316 for thermal discharges • Changes to the Offsets language to allow downstream as well as upstream offsets where appropriate • New discharge quality based on the permit application information • IDEQ, rather than the applicant, will conduct the "Other Controls" compliance evaluation • Defining the significance threshold at 10% and modifying criteria for determining "insignificance" with respect to evaluating cumulative effects" • Substituting the term "reasonable" for "feasible" in the alternatives language (note feasible is still used in subsection 052.06.c.iv.(1) and AIC suggests changing it to "reasonable"), and noting that only appropriate alternatives need be evaluated • Deletion of Bioconcentration Factor (BCF) language and definition • Changing the classification of waters that have not been assessed to a a case-by-case determination based on available information from the default to Tier II • Formally defining "highest statutory and regulatory requirements for point sources " as all applicable effluent limits required by the Clean Water Act and other permit conditions, including compliance schedules or consent orders Finally, AIC provides the following comments on the September 2010 Public Comment Draft:	Thank you. DEQ appreciates the acknowledgement of our effort.

1. Identifying Tier I and Tier II Waters AIC appreciates the changes DEQ has made so far relating to identifying Tier I and Tier II waters. We agree that is appropriate that waters not assessed and waters with insufficient biological data should not be defaulted to Tier II, but be evaluated on a case-by-case basis using available information.	DEQ agrees this is a reasonable compromise between presuming Tier II on one hand and Tier I on the other. DEQ's experience does suggest that the majority of currently un-assessed waters will turn out to be of high quality as data becomes available.
From a point source perspective, we recommend that DEQ develop a list of Tier I and II waters in the supporting guidance so dischargers know what level of effort in necessary to support a new or increased discharge permit application rather than waiting for each permit application to determine the antidegradation status. To limit the scope and effort of this, the list could be initially be limited to waters with existing NPDES permits, and expanded over time as new permits or licenses are proposed. The list should periodically updated as the status of water bodies changes (e.g., perhaps in concert with five-year reviews of TMDLs).	DEQ agrees this limited scope is reasonable and doable and plans to prepare such a list for an appendix in the Antidegradation Implementation Procedures guidance. As AIC points out, this list will have to be periodically updated as the status of water bodies change.
Watershed and Basin Advisory Groups should be consulted for the initial list development and the periodic updates.	DEQ agrees that BAGs & WAGs have a role in antidegradation. They are currently involved in review of our Integrated Report assessments which feed into antidegradation Tier assignments. DEQ plans to address this further in guidance
2. Alternative Analyses and Socioeconomic Justification As noted previously, AIC supports the language changes in the "Alternatives Analysis" section of Draft No. 6.	
One additional comment is that at 052.06.c.iv.(1) the draft still uses the term "feasible", which is not consistent with terminology change made at 052.06.c. in response to previous AIC comments, and should be changed to "reasonable," to be consistent with the language throughout the document.	This is intentional and DEQ believes this to be appropriate. First of all, it is our understanding that some level of economics is part and parcel of engineering feasibility. Secondly, DEQ believes it is the environmental and economic considerations in 052.06.c.iv.(2) and (3) that allow tempering technological feasibility further to what can be reasonable implemented.
This section also requires that alternatives be ranked by cost-effectiveness. The ranking language should be clarified so that it only applies to those alternatives subject to the socioeconomic justification. If this justification is not needed, there is no reason to require applicants to estimate the costs of all alternatives.	The cost effectiveness being referred to in 052.06.c.iv.(1) is for pollutant reductions only, not a matter of whether the project is deemed socially or economically important to the community. It is intended, as is explained in guidance, to

	account for the often non-linear relation between costs and pollutant reduction, .e.g. jumps in cost to go to a new form of technology that only buys marginal reduction in pollution.
We suggest that this section be modified. It appears that this section was largely taken from the State of Washington's rule which are requirements that pre-date and are more stringent than those required in the Clean Water Act (i.e. AKART). We do not believe this language is appropriate or consistent with the approach necessary for Idaho to adopt approvable antidegradation implementation procedures. The Washington language requires an extensive and difficult list of analyses. For example, municipal wastewater agencies traditionally have no experience or expertise in the area of human health effects. The proposed rule requires permittees to "quantify" the benefits and costs of "potential health impacts," "impacts to direct and indirect uses associated with high quality water," and "retention of assimilative capacity for future activities or discharges"? These criteria are very broad in potential scope and extremely difficult to quantify in a rigorous or defensible manner.	This section is not based on nor an edit of the Washington rules, but rather a creation based on several sources and models on how to approach alternatives analysis and social or economic justification, further modified through rule negotiations.
Although subpart 052.06.d.iv. suggests that qualitative analyses may be used, it further states that such qualitative analyses can only be used when those factors "cannot be quantified." These factors can nearly always be quantified to some extent, but in most cases it will be very difficult and/or costly to do so, with considerable uncertainty about the accuracy of defensibility of the analyses. This will have the unintended consequence of making the socioeconomic justification step in the process nearly unattainable, and certainly subject to alternative interpretations and hence challenges by third parties.	The purpose in including language regarding qualitative versus quantitative factors was to allow a proponent to provide quantitative data when it was readily available and qualitative data when it was not. The purpose was not to force qualitative factors to be quantified at high cost or difficulty. For example it may not be easy to put a numeric value on the increased contamination of a popular swimming beach, but the effect on the overall community is worthy of acknowledgement and discussion. Also, it may not be possible to estimate the lost economic benefit of using up all available assimilative capacity but describing the relative change in capacity and the need for future dischargers to meet exceedingly stringent requirements may be less onerous and is important information that should be included. This allows that even without quantitative data, various costs and benefits may be compared and contrasted.
We suggest that DEQ consider other state examples of socioeconomic justification that may be more appropriate for Idaho. One example of EPA approved antidegradation implementation procedure for socioeconomics that we suggest DEQ consider is Colorado's.	In the course of drafting the rule and working with the committee, DEQ considered examples from numerous other states including Colorado. Colorado's approach to social or economic justification is curt and leaves much of

	the decision process up to local governments and land use planning boards. While this may be a simple approach, DEQ also looked at examples from nearby states such as Washington and Oregon who's standards are approved by Region 10 EPA as Idaho's will have to be. While a simplistic approach is being proposed by this comment, it was felt that more detail in the rule would actually help the regulated community understand better and be better able to work with DEQ to prepare a justification that would adequately address the social or economic costs and benefits to the local community. While the rule language proposed here does have more detail than Colorado's, the justification does not have to be overly onerous to fulfill the intent of the justification, merely detailed enough to address some points.
3. Insignificant Discharge: Cumulative 10% Cap on Assimilative Capacity We appreciate DEQ changes to this section to date but continue to have practical concerns with the proposed cumulative cap for assimilative capacity used by a new or increased discharge. The rationale for proposing a 10% cumulative cap was that one facility might seek and obtain multiple lesser increases without having to conduct an analysis for discharge to Tier II waters and obtain a substantial proportion of the allowable Tier II water capacity without analysis. As a practical matter, two problems exist with this approach, methodology/recordkeeping and timeframe. Methodology/Recordkeeping for cumulative assessment of remaining assimilative capacity will be technically difficult to determine. Monitoring data generally are of insufficient number to determine the percent of assimilative capacity with a high level of confidence. This is compounded by technical complexities associated with changes in ambient conditions and therefore assimilative conditions as time passes. The proposed method for determination of assimilative capacity is a sliding scale that allows smaller and smaller increases as assimilative capacity decreases and smaller and smaller increases as the ambient conditions are more pristine. For new or increased discharges to very high quality waters, the 10% of ambient threshold will be very small. A similar condition exists for new or increased discharges to waters with little remaining assimilative capacity. The largest allowable increases without an analysis actually occur at about 50th percentile of the remaining assimilative capacity or ambient condition. Because the proposed	There is some recordkeeping required in tracking loss of assimilative capacity, but DEQ believes our record of 401 certifications will provide this. DEQ knows that EPA will insist upon a cumulative cap, and looking at assimilative capacity. Although there are data availability and variability issues these are nothing new or different then what is currently dealt with in determining whether or not water quality based effluent limits are needed. This is correct.

rule sets the cap at 10% increase of either, the likelihood for multiple permit cycle increases that would significantly impact a Tier II water without triggering an analysis are very remote. Our recommendation is that each new or increased permit be subject to a 10% threshold of remaining assimilative capacity at the time of permit application.	This will not work because it would be conceivable to use most of the assimilative capacity without ever doing a complete Tier II analysis. Without a cumulative cap EPA will not approve insignificance.
4. Special Resource Waters (SRWs) AIC supported the removal of SRWs from the rule as "Tier 2.5" waters. We understood that SRWs would be discussed at the July 21st meeting. With that in mind, we have reviewed EPA's NPDES permit database to compile a list of current NPDES permitted discharges to SRWs (Attachment A). The NPDES Permit Fact Sheet suggests that there are at least 30 municipal wastewater, five municipal water treatment facility, and five stormwater system discharges to SRWs statewide. The current SRW language prohibits any new or increased point source discharge above the design capacity contained in the existing permits. SRW waters include the full range of water quality, from waters with public health closures due to toxic algae blooms (Lake Lowell, 2009) to pristine waters (Middle Fork of the Salmon). A one size fits all designation of SRWs is neither appropriate or practical. This is a substantive issue for all of the Idaho cities currently or with potential new or increased future discharges (e.g., stormwater MS4s) to SRWs as it effectively caps NPDES discharges at current levels regardless of socioeconomic or other considerations that are considered for Tier II waters. We also note that local, state and federal agencies with road and highway responsibilities (e.g., highway districts, Idaho Transportation Department, U.S. Forest Service, and others) could be significantly impacted by SRW requirement for increased discharge. Finally, while reviewing the Fact Sheets of NPDES permitted discharges to SRWs, we observed that EPA considers these waters Tier II for antidegradation analysis purposes and that IDEQ 401 certified those permits. Because the State and EPA have long agreed on multiple permits that Tier II is the appropriate antidegradation status for SRWs, we believe that three tiers of antidegradation are consistent with federal requirements and sufficient to protect high quality waters in Idaho. AIC respectfully suggests that SRWs be reviewed on a case-by–case basis for antidegradation status, which we anticipate will result in appropriate Tier I, II, or III protections for each water currently designated SRW. We also recommend that Section 58.01.02.400.01.b. be modified to state that new or increased discharges of pollutants to SRWs must meet the applicable requirements of the Department's antidegradation designation for each SRW, and strike the language prohibiting discharges above the design capacity of the facility.	SRWs predate current state law and the federal regulations on antidegradation and much effort went into crafting the present language and the many designations of SRWs currently in Idaho rule. While DEQ initially proposed simply melding SRWs into the Idaho antidegradation policy, DEQ met resistance to that notion and backed off. While DEQ believes SRWs are a form of antidegradation, they are different from any of the three tiers described in state law or federal regulations (hence the 'Tier 2.5' moniker). Because of their long history, DEQ does not believe SRWs can be simply and quickly and dealt with by parsing them into Tier I and Tier II. DEQ believes future disposition of SRWs requires more discussion and that a separate rulemaking is needed to adequately vet all the changes in designations DEQ would be making and the potential relaxation in protection from degradation that would result. It is incorrect to state that EPA and DEQ have long agreed that Tier II is the appropriate antidegradation status for SRWs. There are many oddities in EPA NPDES fact sheets regarding antidegradation, DEQ has even seen mention of an Outstanding Resource Water, of which there are none. Some of this is historical and being improved upon over time as DEQ works closer with EPA on implementation of antidegradation. It is also true that fact sheets are not updated between draft and final permits, or between draft and final 401 certifications issued by DEQ. So statements made by EPA that DEQ doesn't agree with are not always corrected in these fact sheets.

Again, AIC is pleased to participate in this important rulemaking and appreciates DEQ's efforts to date to include us and others in what has been a productive and transparent process.

Attachment A

NPDES Discharges to Special Resource Waters (SRWs)					
Jun-10					
	Known discharge to SRW				Potential Discharge to SRW/tribs
	Municipal	Stormwater	Induatrial	Other	
1	Ashton	Boise MS4	Cabinet Gorge PS	Boise Geothermal	Grangeville
2	Ahsahka H2O&SD	CdA MS4	Idaho Cobalt Project	Bonners Ferry WTP	Nez Perce
3	Bonners Ferry	IDOT #1	Meridian Bear Track Mine	IDF&G Kootenai River Nutrient Injection	Pierce
4	Cambridge	IDOT #3	Potlatch @ St Maries	USFS: Fenn RS	North Idaho Correction Facility
5	Cascade	Lakes Hwy Dist	Thompson Creek Mine	USFS: Moose Cr RS	
6	Council			USFS: Slate Cr RS	
7	Driggs				
8	Elk Valley Subdivision (Pine)				
9	Glens Ferry				
10	Hailey				
11	Horseshoe Bend				
12	Kamiah				
13	Ketchum				
14	Kootenai-Penderay SD				
15	Kooskia				
16	Lava Hot Springs				
17	Mackay				
18	Marsing				
19	Meadows Subdivision				
20	New Meadows				
21	Montpilier				
22	Orofino				
23	Orofino WTP				
24	Riggins				
25	Riverside SD				
26	Riverside WTP				
27	St Anthony				
28	Salmon				
29	Southside SD				
30	Stites				

DEQ appreciates your preparation of Attachment A.

Paul Glader, Manager, Environmental Services, Hecla Limited

Hecla has been involved in the preliminary "negotiated" rulemaking efforts associated with this Docket to date and appreciates the opportunity to comment on the proposed rule. Our comments are as follows:

1) As an introductory comment, Hecla takes exception to the allegation that the state of Idaho does not implement the state's antidegradation policy merely because there is some perceived lack of a formal written document outlining the approach. Both the water quality-based permitting approach, coupled with biological

The CWA regulations require that states describe methods for implementing the antidegradation policy. 40 CFR 131.12; PUD No.1 of Jefferson County v. Washington, 511

assessment/opinions where required by federal law, fully protect the beneficial uses of Idaho's waters. We are not aware of any situation in Idaho where the technical lack of a written implementation approach for the antidegradation policy has jeopardized any beneficial uses anywhere in the state. In DEQ's response to comments, Hecla specifically requests an identification of any instances in Idaho where the alleged lack of a written antidegradation implementation document has resulted in a failure to protect applicable beneficial uses of those waters in Idaho that qualify as "waters of the United States".	U.S. 700,705 (1994). A state can not meet this obligation by including no specific language regarding how the policy will be implemented and instead simply generally referencing its WQS and water quality based programs. Northwest Environmental Advocates v. EPA, 268 F. Supp2d 1255,1265 (D.OR 2003)("An omnibus reference that the state's entire water quality standards 'will be implemented' can not rationally be read as a 'policy' that specifically identifies the 'methods for implementing such a policy.'"); See also, Kentucky Waterways Alliance v. Johnson, 540 F.3d 466 (6th Circuit 2008); Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp.2d 732 (S.D. W. Va. 2003). Therefore, DEQ disagrees that there is no need for the adoption of a specific implementation plan. In addition, contrary to Hecla's comment, the obligation to have an implementation methodology does not depend upon a showing that, without such a methodology, beneficial uses are jeopardized.
2) The "DESCRIPTIVE SUMMARY" section in the Idaho Administrative Bulletin states "Federal law requires the state to have both an antidegradation policy and methods to implement the policy." This is not correct. The only Clean Water Act (CWA) reference to the implementation of an antidegradation policy is specific to the Great Lakes region. CWA Sec. 303(d)(4)(B) only contains a reference to an "antidegradation policy", not implementation of an antidegradation policy, with application here specific to situations concerning the technology based effluent limitations of CWA Sec. 301(b)(I)(A) & (B). It is clear that water quality-related effluent limitations required under CWA Sec. 302 are considered by Congress as meeting antidegradation considerations, otherwise Congress would have included CWA Sec. 302 as falling under the "antidegradation policy" provisions of CWA Sec. 303(d)(4)(B). The unrestrained "implementation" of an antidegradation policy in state rules, beyond the clear reading of the CWA, appears to be an outgrowth of both federal regulations at 40 CFR §131.12 and court reliance on federal regulations. Further, there is absolutely no legal support in the CWA for the current federal regulatory position that an antidegradation policy is part of a water quality "standard". The CWA is quite clear that a "standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses" and EPA's review and approval authority is limited to "standards" and nothing more according to federal, thus Idaho law. All else is nothing more than an unsupported expansion of the CWA by EPA. As such, the actual implementation of "antidegradation" rests exclusively with the individual States, as guaranteed by Congress at CWA Sec. 101(b). In DEQ's response to comments, Hecla specifically requests DEQ to identify the language in the CWA	EPA has consistently interpreted the CWA as requiring an antidegradation policy and implementation methodology as described in the federal regulations. The courts have supported EPA's interpretation. PUD No.1 of Jefferson County v. Washington, 511 U.S. 700,705 (1994); Kentucky Waterways Alliance v. Johnson, 540 F.3d 466 (6th Circuit 2008); Ohio Valley Environmental Coalition v. Horinko, 279 F. Supp.2d 732 (S.D. W. Va. 2003). Therefore, DEQ believes there is strong legal support for adopting an antidegradation methodology in the WQS.

supporting the statement that "Federal law requires the state to have both an antidegradation policy and methods to implement the policy."	
3) The "DESCRIPTIVE SUMMARY" section in the Idaho Administrative Bulletin states "DEQ proposes to revise its Water Quality Standards, IDAPA 58.01.02, to include procedures for implementing efforts to limit degradation of water quality." It is our understanding that this entire "negotiated" rulemaking process was intended to develop rules to implement Idaho's antidegradation policy. Why is it that Idaho's law is not prominently displayed in the introduction of the rule itself with a statement directing that antidegradation must be implemented within the clear reading of Idaho law? The verbatim language from Idaho Code, as follows, must be inserted within the rule language at 58-0102-1001.052: "The antidegradation policy shall be implemented in strict accordance with the plain reading of Idaho Code as follows: **39-3603. GENERAL WATER QUALITY STANDARD AND ANTIDEGRADATION POLICY.** The existing instream beneficial uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected. Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of this chapter, and the department's planning processes, along with appropriate planning processes of other agencies, that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such reductions in water quality, the department shall assure water quality adequate to protect existing uses fully." In DEQ's response to comments, Hecla specifically requests DEQ to describe exactly why Idaho law specific to antidegradation should not be the focus of antidegradation implementation.	At the urging of the negotiated rulemaking committee, DEQ has retained the antidegradation policy as set forth in its existing WQS. This language is almost identical to the policy set forth in Idaho Code, and is certainly consistent with the statutory language. Language added to the WQS was added in order to mirror the requirements in the CWA regulations. DEQ believes the proposed rule is consistent with Idaho and federal antidegradation law.
4) The proposed rule clearly goes beyond legislative intent. In addition to the concerns in above comments, Idaho Code is crystal clear on the legislative intent in implementing the requirements of the CWA. IC 39-3601 states: 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. The verbatim language of the federal antidegradation policy regulations is as follows: **§131.12 Antidegradation policy** (a) The State shall develop and adopt a statewide antidegradation policy and identify the methods for	DEQ disagrees with Hecla that the proposed rule goes beyond the requirements of the CWA and the federal implementing regulations. Each of Hecla's examples are addressed as follows:

implementing such policy pursuant to this subpart. **The antidegradation policy and implementation methods shall at a minimum, be consistent with the following:** (1) Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. (2) Where the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State's continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development In the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully. Further, the State shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for nonpoint source control. (3) Where high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected. (4) In those cases where potential water quality impairment associated with a thermal discharge is involved, the antidegradation policy and implementing method shall be consistent with section 316 of the Act. (emphasis added) It is key to note the above federal regulatory language at §112.(a) addresses both the "antidegradation policy" AND the "implementation methods". Any rule language implementing an antidegradation policy that is more stringent than the plain reading of the federal regulatory requirement violates Idaho Code. Examples of more stringent requirements in the proposed rule include, but are not limited to:	
1. The proposed rule language at 58-0102-1001.052.10.g. (page 463 of the 1 September 2010 Idaho Administrative Bulletin) contains what amounts to a "zero" discharge requirement for Outstanding Resource Waters (ORWs) by requiring "offsets", a condition not required by the CWA. In addition, such "offsets", according to proposed rule language at 58-0102-1001.052.08.c. (page 459 of the 1 September 2010 Idaho Administrative Bulletin) must be included as a permit or license condition - again, nowhere required by the CWA. If an "offset" is negotiated, this is outside any federal requirement.	The federal regulation quoted by Hecla provides that water quality in ORWs shall be maintained and protected. DEQ's proposed new rule language is identical. Offsets provide a way to allow new or increased discharge to ORWs if there is no degradation as a result of offsets of the pollutant loading. The offset language clearly is not more stringent than CWA requirements.
Further, the proposed rule language at 58-0102-1001.052.10.g. presumes tributaries to ORWs can be treated as ORWs! There is ABSOLUTELY NO legal basis whatsoever in the CWA or Idaho law for this, thus a	The inclusion of tributaries to the new rule language regarding point source discharges to ORWs was included

clear violation of Idaho Code.	to be consistent with existing language regarding nonpoint source discharges to ORWs. The reference to tributaries, however, is only included in the paragraph heading, and has no substantive import. Therefore, DEQ agrees to delete the reference to tributaries in the heading of this section.
2. EPA-approved antidegradation policy implementation in other states exempts reissued permits from antidegradation reviews, yet the preliminary draft rules do not - again, more stringent than allowed by Idaho Code. Such an exemption is perfectly rational given that antidegradation is designed to maintain existing instream beneficial uses and the level of water quality to protect those uses (which includes existing permit discharges). Further, both anti-backsliding provisions of existing permits and the water quality-based permitting process, which is now the norm, fully implements the antidegradation policy as commented above. Further, unless expressly required by law, rule implementation is to be prospective in nature, not retroactive.	DEQ disagrees with Hecla's interpretation of the Idaho Code requirement that DEQ fully meet the goals and requirements of the CWA and not impose requirements beyond those in the CWA. Hecla cites to other state standards as examples of how DEQ is being more stringent than CWA requirements. But the CWA does not specify one method of meeting the antidegradation requirements. Instead, states are allowed a fair amount of discretion in describing implementation methods. Just because one state's implementation methodology has been approved, does not mean that a different approach is more stringent than required. Therefore, DEQ disagrees with Hecla that, to the extent DEQ's proposed rule is different from the WQS adopted in Kentucky or Colorado, for example, DEQ's rule is somehow more stringent than federal law. In addition, DEQ's rule does not exempt reissued permits from antidegradation because that is not the pertinent question. The pertinent question is whether the reissued permit will degrade water quality due to an allowed increase in discharge. If degradation won't occur, as is the case for reissued permits that do not authorize an increase in discharge, then under the proposed rule no Tier 2 analysis would be required.
3. Throughout the proposed rule, the phrase "activity or discharge" is used. This phrase is found nowhere in either IC 39-3603 or the federal regulation's antidegradation policy at 40 CFR §131.12. This can be interpreted to apply to activities where a discharge to waters of the United States does not occur - a clear violation of Idaho Code. This phrase must be changed to "an activity creating a discharge to waters of the United Sates".	The use of the word activity is consistent with the U.S. Supreme Court's interpretation of section 401 of the CWA. PUD No.1 of Jefferson County v. Washington, 511 U.S. 700 (1994). DEQ's rule language is intended to fully meet, but not go beyond, the authority provided Idaho under section 401 of the CWA. See response to comments by Alex LaBeau, Idaho Association of Commerce and

	Industry and Jack Lyman, Idaho Mining Association regarding the use of the phrase "activities."
4. EPA-approved antidegradation policy implementation in other states places 303(d)-listed waters to those states' equivalent "Tier 1"/§131.12(a)(I) category, which is wholly appropriate for "impaired waters" and other waters not deserving "high quality" designation. This approach was both approved by EPA and recently upheld by the United States Court of Appeals, Sixth Circuit (Kentucky Waterways Alliance v. Johnson, No. 06-5614, 3 September 2008). The rule must explicitly state 303(d)-listed impaired waters are automatically given Tier I status, otherwise a clear violation of Idaho Code exists. In DEQ's response to comments, Hecla specifically requests DEQ to describe exactly where in the CWA the above requirements are located and why the proposed rule does not violate IC 39-3603.	Again, DEQ disagrees that other state standards provide the only allowed method of meeting CWA requirements. The Kentucky antidegrdation rules continue to be litigated with a new filing on Sept. 10, 2010 (Kentucky Waterways Alliance, et al. v. Jackson). Until legal arguments are settled Kentucky's rule language can not be relied upon as approvable. Water that is listed as impaired on the 303(d) list is so listed for a specific cause or pollutant. Such a waterbody can have very high quality in other respects. See response to comments by Mark Benson, Potlatch Corporation and Alan Prouty, J.R. Simplot Company regarding Identification of Tier I and Tier II waters.
5) Exemptions from antidegradation review need to be expanded beyond "**Restoration Projects**" to include both any activities subjected to federal biological assessments or biological opinions and to all activities within any superfund-related site where water quality is a component of the superfund remedy. Such exemptions are appropriate given the extraordinary level of detail given to such sites and activities.	See response to comments by Alan Prouty, J.R. Simplot Company regarding restoration projects.
6) The proposed rule also circumvents Idaho Code in another key aspect. Definitions in the statute are being contradicted by definitions in the proposed rule. Idaho Code sets out key definitions, specific to water quality, such as: "Lower water quality" means a measurable adverse change in a chemical, physical, or biological parameter of water relevant to a designated beneficial use, and which can be expressed numerically. Measurable adverse change is determined by a statistically significant difference between sample means using standard methods for analysis and statistical interpretation appropriate to the parameter. Statistical significance is defined as the ninety-five percent (95%) confidence limit when significance is not otherwise defined for the parameter in standard methods or practices. (IC 39-3602(11)) It is disturbing to note that this statutory definition exists in the current rule yet is stricken. The proposed definitions of both "Degradation or Lower Water Quality" and "Measurable", used together, attempt to turn the intent of Idaho's statutory definitions from water quality "relevant to a designated beneficial use" to any	DEQ is aware that the definition of degradation or lower water quality is different from the Code definition. This was a specific topic of discussion during the negotiated rule meetings. DEQ believes the changes in definition are needed and as a consequence is also proposing legislation that will sync the statutory and regulatory definitions for lower water quality.

change in water quality alone, simply because it is "measurable". This occurs because the proposed definition of "Degradation or Lower Water Quality" includes the phrase "beneficial uses **that may be made**" - a concept found nowhere in either the CWA or Idaho Code. A "beneficial use" is either "designated" or "existing", and NOT open to speculation! The phrase "that may be made" must be stricken from the proposed definition.	
Similarly, the proposed rule definition of "Assigned Criteria" contains the term "presumed" designated use. There are no "presumed" uses in Idaho Water Quality Standards. The word "presumed" has no place in the proposed rule and must be deleted. Here again, proposed rule language, which is in opposition to Idaho Code, sets up a potential defacto "zero" growth, thus an anti-economic development situation, contrary to legislative intent. Idaho Code must be thoroughly reviewed to assure rule definitions do not contradict the intent of the statute.	The existing WQS at section 101 address the protection of water bodies that are not specifically designated for a particular use. Prior to designation, DEQ presumes undesignated waters support cold water aquatic life and recreational uses and protects such waters for these uses. This language was the result of litigation challenging DEQ's WQS, and the language is consistent with EPA regulations that provide that waters must be protected for fishable/swimmable uses unless it is shown that such uses are not attainable.
7) The "DESCRIPTIVE SUMMARY" section in the Idaho Administrative Bulletin states that DEQ "intends to develop supporting guidance". We oppose the development of any such guidance as the rules should be clear at face value to implement the antidegradation policy. Further, the costs associated with development of such guidance are not included in the "FISCAL IMPACT STATEMENT".	DEQ may use guidance to provide an interpretation of a rule. See APA, Idaho Code sections 67-5250(2) and 67-5201(19)(b)(iv). In addition, the negotiated rulemaking committee supported the development of guidance.
8) The "IDAHO CODE SECTION 39-107D STATEMENT" is not correct in that the proposed rule most certainly includes rules both broader in scope and more stringent than required by federal regulations. The fact that federal regulations do not have any requirements similar to those in the proposed rule does not somehow void this statutory language simply because there is no mirror federal regulation to judge the proposed rule against. Further, IC 39-3601 is the proper legal measure because this portion of the law is specific to the CWA, whereas IC 39-107D is generic.	DEQ disagrees with Hecla that the proposed rule is more stringent or broader in scope than federal law or regulations. DEQ has addressed in these responses to comments those specific areas in which Hecla has asserted DEQ has gone beyond CWA requirements.
9) The proposed rule definition of "Highest Statutory and Regulatory Requirements for Point Sources" includes "other permit conditions", "compliance schedules" and "consent orders". These three add-ons are not specific statutory or regulatory requirements - they are specific to individual situations. These add-ons are and must remain part of permit negotiations with individual permittees outside the influence of any rules more stringent than or broader in scope than required by law. This definition must be limited to "All applicable effluent limits required by the Clean Water Act and federal regulations."	Other permit conditions, compliance schedules, and consent orders are regulatory, and required to be met once in place. DEQ agrees that such provisions are dependent upon site specific situations, and will be a part of regulatory requirements only as needed and appropriate.
10) The proposed definitions of both "Existing Activity or Discharge" and "New Activity or Discharge" must be limited to an actual "discharge" as commented above in 4). In addition, an "authorization" must	Please see response to point 3 above and DEQ's response to comments by Alex LaBeau, Idaho Association of

include those activities taken under superfund, which do not require either a permit or a license. As commented above at comment 5), superfund activities must have a clear exemption from antidegradation review.	Commerce and Industry and Jack Lyman, Idaho Mining Association regarding the use of the term "activity". DEQ does not agree that all superfund activities should be exempt from antidegradation provisions. While permitting requirements need not be met for point sources, CERCLA still requires compliance with the substantive requirements of the CWA, including WQS.
11) Proposed rule language at 58-0102-1001.052.07. (page 458 of the 1 September 2010 Idaho Administrative Bulletin) states that "No degradation of water quality may be allowed that would cause or contribute to a violation of water quality criteria." This absolute "zero" degradation requirement does not appear anywhere in either law or federal regulation addressing antidegradation. The same applies to paragraph 07.b. of this subsection, which also applies "zero". Antidegradation is to address the protection of beneficial uses and the level of water necessary to support those uses. It is a scientific fact that criteria are more stringent than necessary to protect a use, and that a use can be protected within a range of water quality above a numeric criteria value. We recognize that 07.a. somewhat addresses this concern, but this provision, even though it may be present in other areas of CWA regulations or rules, is NOT in antidegradation regulations, thus must be removed from the proposed antidegradation implementation rules to comply with Idaho Code.	DEQ disagrees that it has established a zero discharge requirement by stating that discharges can not violate criteria established to protect uses. Establishing criteria that can not be violated in order to protect uses is a critical component of the CWA and is a part of the existing state and federal law.
12) Proposed rule language at the entirety of subsection 58-0102-1001.052.08. (page 459 of the 1 September 2010 Idaho Administrative Bulletin) contains numerous items of concern which contradict the mandate of Idaho Code. These include:	
• At the outset, this subsection addresses "each parameter of concern" - this needs to be limited to "assigned criteria" throughout. This should not be left open for the entire periodic table of the elements. If criteria have not been developed for a parameter, then it has not been identified as enough of a "concern", from a beneficial use protection standpoint, to warrant criteria development. Further, narrative criteria, instream bioassessments, and WET testing are utilized to cover situations where all-inclusive specific criteria for every imaginable "pollutant" have not been developed.	DEQ views parameters of concern as a select subset of applicable criteria, determined by the nature of the discharge and the setting in which it occurs. DEQ has replaced 'pollutant of concern' with 'pollutant' at the suggestion of Alex LeBeau, Idaho Association of Commerce and Industry and Jack Lyman, Idaho Mining Association (see response below).
• Existing permits have to be excluded as commented in 4) above.	Exiting permits will be looked at only when renewed. See response to example 2 above.
• At 08.a., there is also no federal antidegradation mandate to evaluate a discharge "under critical conditions coupled with the design flow" - again, violating stringency limitations expressly contained in Idaho Code. It has been our experience that "critical conditions", which combine maximum discharge volume into minimum receiving stream flow, NEVER occur.	This is inherent in the applicable criteria (IDAPA 58.01.02.210.03.b). See response to comments by Alex LaBeau, Idaho Association of Commerce and Industry and Jack Lyman, Idaho Mining Association, regarding critical

	conditions and edits to section 052.08.a.
• This subsection also speaks of "the activity or discharge" - this has to be limited to a "discharge" or, at a minimum, "an activity creating a discharge to waters of the United States".	See response to comments by Alex LaBeau, Idaho Association of Commerce and Industry and Jack Lyman, Idaho Mining Association, regarding the use of the terms "activity" and "discharge."
• Any evaluation of an existing permit must be limited to changes that result in the discharge of an entirely new parameter in the discharge in more than insignificant amounts, and not just because a new parameter is added to the permit list even though this parameter has been discharged all along, thus pro-dating this rulemaking (08.a.iii.).	DEQ's review will look at a new parameter added to a permit for the first time, but if its load is not being increased as compared to before it was added to the permit DEQ would not conclude there is degradation; therefore, no additional Tier II analysis would be required.
• At 08.c., it makes no sense to mandate offsets "must be upstream" of the discharge. There is no reason not to leave this open to site-specific conditions. Further, there is no federal law mandating that any offsets have to be made a permit or license condition, again a violation of the "no more stringent" mandates of Idaho Code. This section is where "activity" obviously has to be eliminated because the proposed rule disallows an activity from even beginning (i.e. you can't construct even though the regulated "discharge" is not occurring).	For clarity, the rule requires offsets to be upstream of the degradation, not the discharge which leaves the evaluation open to site-specific conditions. If offsets are not upstream, and do not occur before a new or increased discharge takes place, then there will be degradation of a segment of water, for some period of time. While it is true there is no requirement for offsets in federal rule, nor for insignificance, DEQ views these additions to the rule as a way to make the rule sensible.
• Paragraph 08.d. speaks of a "measureable change" in a vacuum without the tie to beneficial uses mandated by IC.	Section 08.d has been stricken from the proposed rule.
• An additional concern is that this subsection, as proposed, appears to be designed exclusively to further restrict or effectively eliminate mixing zones.	This is neither the design nor the intent.
13) Proposed rule language at paragraph 58-0102-1001.052.09.d (page 461 of the 1 September 2010 Idaho Administrative Bulletin) clearly is inappropriate for "existing" discharges in place as of the effective date of the resultant antidegradation implementation rule. There is no rational basis for a need to conduct a socioeconomic justification for discharges related to activities either already In place or no longer in a production status. This is yet another reason to exempt existing sources from antidegradation review, as allowed in other states by EPA, and thus mandated by Idaho Code.	Socioeconomic justification is of the degradation in water quality being sought. For an existing source it would look only at the requested increase in discharge. DEQ believes this is required by law and regulation.
14) A final item of concern involves dates associated with existing rule language that is simply relocated. We would expect that the associated dates would remain those of the original date of the language. Rules in	Dates in the rules do not indicate the original date of the language; they indicate only the date it was last revised, in

place do not require any more review/approval and a new date, which is not associated with the actual date of the rule language, would only confuse the rule origination date. 15) Hecla hereby incorporates by reference past written comments submitted by Hecla during the negotiated rulemaking process. In addition, Hecla is a member of both the Idaho Mining Association and the Idaho Association of Commerce and Industry, thus we support the comments of these two trade associations that are not addressed by Hecla's comments, including, but not limited to, comments concerning general permits, significant degradation, and Special Resource Waters. Hecla will remain involved in the rulemaking process due to concerns that antidegradation implementation may result in a "zero" or "no economic growth" outcome, with potential rules being more stringent than necessary, thus contrary to both the intent of the Legislature and best interests of Idaho's productive community.	any way. This is required by Idaho's Administrative Procedures Act. It is not DEQ's intent, nor does DEQ believe that antidegradation implementation will result in a "zero" or "no economic growth" outcome.
Matthew Van Vleet, Director, Public Affairs, Clearwater Paper Corporation Clearwater Paper submits this letter as comments to the subject proposed rule. We have been involved in the development of the subject proposed rule and participated in subject rulemaking since it was initiated in April 2010 through the Idaho Association of Commerce and Industry (IACI). IACI attended all six (6) negotiated rulemaking meetings and provided extensive written and verbal comments throughout the negotiated rulemaking. We associate our comments with those they have made and submitted. Our concerns are similar to those submitted by other IACI members and representatives from the forest products business sector in Idaho, as well as those submitted by other manufacturing entities. The proposed rule has the potential to greatly complicate the process and delay the timing for obtaining Clean Water Act permits, and therefore has the potential to negatively affect our industry as well as other businesses that require Clean Water Act permits to conduct operations and provide jobs within Idaho. Our role and that of other forest products businesses in Idaho involved in this rulemaking has been to support a rule that meets the requirements of the Clean Water Act without unduly burdening Idaho industry during the Clean Water Act permit process. This is consistent, not only with our company values, but with the Idaho Legislative directive that IDEQ rules not go beyond federal requirements. While we appreciate IDEO's efforts to conduct a meaningful negotiated rulemaking process and in their effort to address our and other forest products business concerns, we believe the rule needs further clarification and refinement before it moves forward.	While antidegradation review will be integrated into new or reissued NPDES permits, DEQ believes this can and will be done without causing any delay in permitting. This may mean DEQ needs to begin interacting with EPA and the permit applicant sooner than is now the case DEQ's goal as well is to create a rule that meets the requirements of the Clean Water Act without unduly burdening Idaho industry, or DEQ. DEQ is recommending to the DEQ Board several changes in the rule in response to comments in order to refine it. DEQ is also working on a guidance document to help

Thank you for the opportunity to comment on the proposed rule. Clearwater Paper Corporation will continue to monitor the progress of this rule when it is submitted to the IDEQ Board and potentially to the Idaho Legislature for approval.	clarify implementation.
Justin Hayes, Program Director, Idaho Conservation League Thank you for the opportunity to provide comments on DEQ's proposed rule related to the development of rules related to Clean Water Act antidegradation requirements. The Idaho Conservation League has a long history of involvement with water quality issues in general and this matter specifically. As Idaho's largest state-based conservation organization we represent over 9,800 members, many of whom have a deep personal interest in protecting Idaho's water quality and the health of all Idahoan's from the harmful effects of pollution. DEQ's heretofore failure to develop meaningful antidegradation rules and implementation guidance has contributed to the continued decline of water quality in numerous waterbodies across the state. Past efforts on the part of our organization to encourage DEQ to develop rules to address the antidegradation requirements of the Clean Water Act had failed, leaving us no other recourse than to initiate the legal action that ultimately led to DEQ initiating this rulemaking.	
We had hoped that this rulemaking would result in the development of rules that would sufficiently protect Idaho waters from degradation and meet the legal requirements of the Clean Water Act. However, upon review of the proposed rule, we conclude that DEQ's final product will not sufficiently protect Idaho waters from degradation nor will the proposed rule pass final legal muster. As such, the Idaho Conservation League cannot support this proposed rule. Further, we ask that the Board of the Department of Environmental Quality reject the rule as proposed.	DEQ believes the rule that emerged from negotiated rulemaking does meet the legal requirements of the Clean Water Act and can sufficiently protect Idaho waters from further degradation, if implemented.
In the interest of 'full disclosure' we feel compelled to notify the agency and the Board that should this rule be submitted to the EPA for consideration we intend to actively pursue all administrative and legal means to stop this rule from being implemented until is it substantially modified. Further, we will do whatever we can to encourage the EPA to promulgate what rules are necessary to protect Idaho water quality until such time as the State of Idaho develops acceptable antidegradation rules and implementation guidelines.	DEQ believes EPA can and will approve the rule DEQ currently has proposed, as modified in response to comments.
We have participated extensively in the development of this proposed rule. In doing so we provided extensive comments (both in the formal rulemaking setting and directly to DEQ staff) on this matter. With an interest in minimizing redundancy, we are incorporating all of our former comments into this letter by reference. We are attaching some specific comments as a means of summarizing some of our concerns.	

Identification of Tier I and Tier II waters (052.06) We do not support DEQ's decision to use a waterbody-by-waterbody approach to determining tier II applicability. This approach appears to be very complicated to administer and likely to result in the misclassification of waterbodies. We strenuously object to DEQ's inclusion of clauses that allow waterbodies that have not been assessed (see 051.06.b) or for which insufficient data exists (see 051.06.c.(3)) to be classified as in a less protective tier. We continue to believe that a parameter-by-parameter approach would be easier to administer and would result in a more robust means of assigning designations.	DEQ agrees that a parameter-by-parameter approach would be simpler and easier to administer, but in rulemaking negotiations DEQ went to the present waterbody-by-waterbody (WbW) approach. While the WbW approach ties less cleanly to the 303(d) list of impaired waters, it does make better use of DEQ's biological monitoring data which provide insight into the overall quality of a water body.
Tier I Review (052.07.a) When determining if the existing beneficial uses are protected during the issuance or reissuance of a discharge authorization, the proposed rule states that the "Department shall rely upon the presumption that, if the numeric criteria established to protect specific uses are met, then the existing beneficial uses they were designed to protect are protected." (see 051.07.a) We believe that this provision fails to consider, among other things, situations where several cumulative stressers may be present in a waterbody – each in compliance with its own criteria, but cumulatively harming a designated or existing use.	This is an issue with criteria in general and can not be corrected through changes in antidegradation rules. DEQ notes that biomonitoring, of which DEQ has an extensive database, addresses this concern for aquatic life use by directly monitoring biological health. DEQ has for other reasons removed this section from the rule. See response to comments by Christine Psyk, US EPA Region 10 regarding Tier I review.
General Permits (052.04) We oppose DEQ's proposal to allow for antidegradation review at the General Permit level. It is not possible to conduct a credible review of individual actions when the specifics of these actions are not known. At the General Permit level, DEQ will not even know where or when a specific discharge may take place. It is simply not possible to conduct an antidegradation review without this most basic of information. DEQ includes language stating that reviews may be required of individual actions carried out pursuant to a general permit. However DEQ fails to include any metrics that might guide DEQ in deciding when a review would be required for an individual project. As such it appears that any decision made pursuant to this prevision would be completely arbitrary. Further, it is not clear when it would be timely for parties to raise objects regarding the lack of sufficient antidegradation review. Should these be raised (and appealed) when the general permit is issued or when an individual activity is implemented? We are aware that DEQ is modeling this section's language off of a model developed by the State of Washington. However, we do not think that using Washington's methodology is protective, nor is it legal. The Washington language has yet to be tested in the judicial venue –Idaho should not assume that merely because Washington's language went unchallenged that similar language in Idaho will also go unchallenged.	General permits are a necessary part of the NPDES program. DEQ believes it is possible, for some general permits with proper conditions, to conclude the general permit complies with the antidegradation requirements without having to evaluate every individual action authorized under the general permit. If a general permit inadequately addresses antidegradation, DEQ may require review at the NOI level. Because not all general permits are equal, DEQ is likely to come to different conclusions regarding whether particular general permits comply with Idaho's antidegradation policy. The requirements in some general permits may be stringent enough and there may be information in the permit record to provide DEQ assurance that insignificant impacts would result if an activity were to affect high quality water.

Restoration Projects (052.02) DEQ's proposal to allow restoration projects without an antidegradation review represents on unlawful exemption. Further, DEQ has failed to define restoration projects. As a result, it is possible that a traditionally regulated dischargers may attempt to either represent itself as a "restoration project" or connect itself to a "restoration project" in an attempt to avoid conducting an antidegradation review.	A restoration project is one that is "designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished". DEQ does not believe any traditionally regulated discharge can legitimately claim restoration as their purpose. In addition, restoration projects are those intended to secure long-term water quality improvements, and thus by definition will not result in long term or permanent degradation.
Waters Subject to the Antidegradation Policy (051.05) We believe that it would be more appropriate to provide that the antidegradation policy would apply to all Waters of the State of Idaho. DEQ's preference to limit applicability to waters subject to the jurisdiction of the Clean Water Act likely creates the situation where degradation will occur in those waters that fall outside of the Clean Water Act. Ultimately these non-jurisdictional waters flow into jurisdictional waters. Failure to protect these non-jurisdictional waters from degradation will ultimately lead to degradation of jurisdictional waters.	The Clean Water Act only requires application of the antidegradation policy to waters of the U.S., and applying the rule to other state waters may conflict with Idaho Code section 39-3601. To our knowledge there are no licensed or permitted discharges to non-jurisdictional waters in Idaho. DEQ notes that any licensing or permitting action under the Clean Water Act must meet downstream water quality standards.
Evaluation of Effect on an Activity or Discharge on Water Quality (052.08.a) When applied to the reissuance of permits or licenses, this provision of the proposed rule will result in grandfathering in previously permitted degradation that has not yet occurred in the waterbody. Because Idaho has failed to previously implement a lawful antidegradation program, no lawful antidegradation reviews have ever been conducted in Idaho by DEQ as part of the 401 certification process. As a result, many past and current permits and licenses have failed to protect waters from antidegradation. Thus it is totally inappropriate to presume that the full discharge of all currently permitted effluent limits would protect waterways from degradation. However, that is exactly what this provision presumes and allows for. When conducting an antidegradation review and seeking to determine the impact that a reissued permit will have on water quality it is critical that DEQ measure the future impact by comparing it to current water quality in the receiving water. Failure to do so will allow degradation to occur. For example:	The antidegradation policy is prospective in nature, and so DEQ is not required to analyze water quality that existed some time in the past. See Ohio Valley Environmental Coalition v Horinko, 279 F.Supp2d 732, 751 (S.D.W.Va. 2003) ("The present tense use of the verb "exceed" suggests that Tier 2 protection apply to *current* water quality levels, not to any levels that have existed on or after 1975…so the EPA's interpretation of Tier 2 as applying to current water quality levels is reasonable.") This will only allow existing discharges that do not propose increasing their permit limits to avoid Tier II antidegradation analysis upon permit renewal. It does not prevent Tier I review to assure that existing uses and water quality necessary to protect those uses are maintained.

Presume that the town of Jonesville's wastewater treatment facility discharges to State Creek, has a maximum design flow of 1 million gallons per day (gpd) and has a current NPDES permit that allows it to discharge 100 lbs/day of total phosphorus (TP). Recall that since Jonesville is located in Idaho, Jonesville's NPDES permit has never gone through a lawful antidegradation review. Jonesville's facility is currently operating at 50% capacity and is discharging 500,000 gpd and 50 lbs/day of TP. The water quality in State Creek reflects this discharge level. Jonesville applies for a new permit seeking reissuance of their current 100 lbs/day of TP. If DEQ gauges the impact of the new permit by looking solely at the change in permitted discharge on paper, the impact will be 'no change' or no additional degradation of water quality in State Creek as a result of the new permit. This is because DEQ is presuming that State Creek's water quality already reflects a discharge of 100 lbs/day TP. This is an incorrect presumption and results in State Creek's water quality being presumed worse than it actually is. On the ground (or in the river), the impact of this new permit will not be 'no change.' In fact the new permit will allow an 50 additional lbs/day of TP be discharged to the river. This will cause additional degradation of the receiving water. The hypothetical Jonesville example highlights the fact that when reissuing permits to existing facilities, DEQ must base conclusions about degradation on the actual levels of contaminates currently in the waterways. This represents the true status of the water quality. Presuming that prior permitted discharges that are not actually occurring at previously permitted levels reflects water quality will result in allowing degradation that has not yet occurred to occur. We note that DEQ does intend to use actual water quality information to gauge degradation in instances where new permits are to be issued. In these instances DEQ will calculate change by looking at the "difference between existing receiving water quality and water quality that would result from the activity or discharges as proposed in the new permit or license." This methodology is proper and should be applied to the reissuance of permits as well.	This should be the case only for publically owned treatment works (POTW) which are designed to accommodate population growth. This planning, designing, building, and permitting for future POTW waste treatment needs is prudent. In addition, this approach is consistent with the prospective application of the antidegradation policy, as discussed above.
Measurable Change (052.08.d) DEQ proposes that if an activity or discharge will not have a measurable change on water quality then this activity or discharge will be evaluated based on the conclusion that it will have 'no change' on water quality. On face value this seems sensible. However, DEQ's definition of what is, and what is not, measureable renders this provision unacceptable.	This is not a new proposal, but rather something embodied in existing rule language, and State law, that DEQ in rulemaking decided to carry forward. With insignificance in the new rule DEQ believes the concept of measurable

DEQ proposes a definition of "measurable" (010.59) that actually allows changes to occur that can be measured but arbitrarily chooses not to recognize them as measurable. Awkwardly, in an additional clause in the definition of "measureable" (see below) DEQ makes it clear that it recognizes that changes in water quality which can indeed be measured, but are not defined as measurable by the proposed rule, can be very significant to water quality. "Because the Department recognizes that in some cases smaller changes may be significant to human health or aquatic life protection, the Department will in those cases consider calculated changes to be measurable." On balance, DEQ's proposed definition of "measurable" is not acceptable – DEQ chooses to define things that are measurable as 'no change' and then attempts to salvage the situation be acknowledging that this is not protective but failing to provide any metrics to guide them in when a change actually equals a change. The harm caused by this unlawful definition of "measurable" comes full circle when one reviews the proposed definition of "Degradation or Lower Water Quality" (010.18). Here negative impacts which can be measured are dismissed as not "measurable" and the degradation that is caused is deemed be definition to not be degradation after all.	change is redundant and can be omitted which will result in a clearer and easier to implement rule. Thus DEQ has removed measureable from the proposed rule and pursuing a concurrent change in law. Removing measurable change will have consequences for SRWs and ORWs, making them more restrictive.
Insignificant Discharge (052.09.a) DEQ's proposed rule provides for designating certain discharges that have negative impacts on water quality as 'insignificant' and thus exempting them from intergradations review. This is unlawful pursuant to the Clean Water Act. Discharges and activities that will degrade water quality, no matter how small this impact will be, must undergo an antidegradation review. DEQ cannot lawfully create 'insignificant,' immeasurable or de minimis exemptions to antidegradation review.	Insignificant discharge is neither allowed nor prohibited by federal law or regulation. But the courts have upheld the use of insignificance, and EPA has approved of it, as a form of the more general legal principal of de-minimus. While DEQ may debate about the level of insignificance, DEQ believes this is an important and necessary concept that avoids regulatory gridlock.
Additional observations about 'insignificant discharge': Subsection i.(1) and (2) propose some limits to determining what is 'insignificant.' These refinements fail to provide operable sideboards because they are vague and poorly defined. For instance, is DEQ proposing that each activity could individually increase the ambient concentration by 10%? Or is this some sort of cumulative impact of all future dischargers? In subpart (2), what does 'cumulatively' mean?	A 10 % change in assimilative capacity is DEQ's proposed cumulative cap on insignificant degradation of water quality.
Other Source Controls (052.09.b) It is not clear if DEQ is saying that degradation of high quality waters would be allowed only if *all* of the applicable non-point sources where utilizing BMPs or if it would be acceptable for *just some* of the non-	While DEQ believes <u>all</u> is implied, DEQ has made this reasonable clarifying change to the rule.

point sources to have BMPs. This confusion could be remedied by adding the word "all." See below. Other Source Controls. In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the watershed the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for **all** nonpoint source controls. In providing such assurance, the Department may enter together into an agreement with other State of Idaho or federal agencies in accordance with Sections 67-2326 through 67-2333, Idaho Code.	
Socieoeconomic Justification (052.09.d) While DEQ does provide a list of informational factors that will be instrumental in gauging the import of a discharge, DEQ has failed to offer any guidance on how it will make decisions regarding what is, or is not, deemed to be important economic or social development. If an applicant provides all of the information that DEQ is seeking and concludes that their discharge will result on 100 new jobs, is that 'important?' What if it is 10 jobs? How about 1? Absent some rule language that will direct DEQ's decision making on this matter, the conclusions of the agency will be arbitrary.	DEQ is developing guidance that will hopefully make this clearer. Ultimately input from the affected community will be critical in determining social and economic importance. Since each community and discharge will be different, DEQ believes it would be inappropriate to set hard and fast thresholds on jobs, tax base, etc.
Beneficial Use Support Status (054) It appears that DEQ has used the word 'and' when it should have said 'or.' See below: In determining whether a water body fully supports designated ~~and~~ or existing beneficial uses,… The 'or' operator is used similarly in section 055.	This is an existing section of rule not modified by this rulemaking.
Use of Data Regarding pH, Turbidity, Dissolved Oxygen and Temperature (054.03) DEQ's provision that "infrequent, brief, and small" excursions from compliance with water quality criteria runs afoul of the aspects of federal antidegradation requirements that prohibit de minimis exemptions.	This is an existing section of rule not modified by this rulemaking.
Rules Governing Nonpoint Source Activities (350.01.a) The first sentence of this section is ridiculous and should be deleted. It is absolutely not a true statement that "Nonpoint sources are the result of activities essential to the economic and social welfare of the state." While it might be the case that some essential activities result in nonpoint sources of water pollution, it is not the case that all nonpoint sources of pollution are essential to the state.	This is an existing section of rule not modified by this rulemaking.
Typo: In the second sentence of 350.01.a it reads: "The a real …" This seems to be a typo.	Yes this is a typographical error.

There are numerous statements in this portion of the rule that state something akin to 'failure to comply with water standards at nonpoint sources is not a violation of the standards for purposes of enforcement.' DEQ should delete all such statements.	This is something DEQ will take under advisement in Idaho's next triennial review of its water quality standards.
Impairment (010.49) In subsection a(i) it is not clear what might constitute a "major biological group." DEQ lists three: fish, macroinvertebrates, and algae. Are there more such groups? DEQ should enumerate the entire list that they are considering.	Yes, those are the three major biological groups currently used in DEQ's bioassessments. In addition DEQ will use habitat scores since two or more biological community indexes might not always be available. This is consistent with existing rule language at 054.02 and the bioassessment procedures outlined in the Waterbody Assessment Guidance, Second Edition. This definition has been removed from the proposed rule in response to other comments.
New Activity or Discharge (010.65) DEQ's proposed definition for "new activity or discharge" contains a clause that potentially rewards dischargers that are currently flaunting state and federal law and operating illegally. This is the case because, under DEQ's proposed definition, the degradation caused by existing activities and discharges which do not have lawful permits or licenses to operate can be grandfathered in for antidegradation review purposes by the Director. Facilities that are operating illegally and have not had valid antidegradation reviews preformed on their discharges should, under all circumstances, be considered as "new" dischargers/activities when they apply for the required permits and licenses. The clause in 010.65 that provides that the Director may determine that an existing illegal activity may not be treated as a new activity creates an unacceptable loophole in the antidegradation rule.	This gives the DEQ Director discretion to consider extenuating circumstances for previously authorized discharges whose permit or license has lapsed.
Norman Semanko, Executive Director & General Counsel, Idaho Water Users Association These comments are submitted on behalf of the Idaho Water Users Association (IWUA) regarding the above-referenced proposed rule. We appreciate DEQ's efforts to arrive at a workable rule. IWUA is a non-profit corporation representing more than 300 canal companies, irrigation districts, water districts, ground water districts, municipal suppliers, hydropower companies, aquaculture businesses, professional firms and individuals, all dedicated to the wise and efficient use of our water resources. IWUA maintains an active water quality committee and participated in the negotiated rulemaking sessions regarding the proposed rule earlier this year. Specifically, we provided written comments on Revised Draft No. 6 on July 27, 2010.	

While some of our concerns with the draft negotiated rule have been addressed in the proposed rule, many of them have not. Our suggestions are discussed below. In addition, IWUA supports the comments on the proposed rule that have been submitted on or before today by the Idaho Association of Commerce and Industry (IACI), of which IWUA is a longstanding member.	
1. Overall Scope. The proposed rule far exceeds what is necessary to comply with the Clean Water Act. The scope of the rulemaking should be limited to what is necessary for purposes of compliance with the antidegradation requirements of the Clean Water Act. In addition, the antidegradation program needs to be consistent with the provisions and intent of Senate Bill 1284, enacted in 1995, and codified at Chapter 36, Title 39.	DEQ believes the rule is what is necessary to comply with the Clean Water Act, and is also consistent with the legislative directive in Idaho Code section 39-3601 that DEQ fully meet the goals and requirements of the Clean Water Act but not go beyond those goals and requirements. There is one aspect of the rule that is inconsistent with Idaho Code. As DEQ discussed at length with the negotiated rulemaking committee, the rule's definition of degradation or lowering of water quality is inconsistent with the statutory definition of this term; therefore, DEQ is also seeking to amend the statute to ensure consistency.
2. Impaired Waters. Water bodies that are included on the State's 303(d) list of impaired waters should be given Tier 1 protection only. Impaired waters, which by definition do not meet water quality standards, do not exceed water quality standards and therefore should not receive Tier 2 protection. This is true for all covered water bodies, including so-called "Special Resource Waters" (SRWs). We continue to believe that a process should be expressly provided for to remove waters from the SRW list.	Impaired waters are those documented to fail to meet at least one water quality criterion. It is incorrect to conclude from such a listing that that they do not meet all other criteria or fail to support beneficial uses. See response to comments by Alan Prouty, J.R. Simplot Company regarding identification of Tier I and Tier II waters, and Ken Haward, Association of Idaho Cities, regarding SRWs.
3. General Permits. Individual discharges should not be subject to additional antidegradation review when those activities are covered under a general permit. In addition, a general permit should be presumed to have provided for adequate antidegradation protection absent a showing to the contrary. If DEQ does not restrict the rulemaking to what is required under the Clean Water Act, or make the other changes suggested here, we believe that the Idaho State Legislature may have no choice but to reject the proposed rule and instead consider additional legislation to modify the existing statutory provisions as necessary to comply with the Clean Water Act, similar to what was done by the legislature in 1995 to bring Idaho's TMDL program into compliance. We appreciate the opportunity to provide these comments.	Section 401 of the Clean Water Act requires DEQ certify that there is a reasonable assurance an activity authorized by a federal license or permit will comply with state WQS, including the antidegradation provisions. Individual discharges will not be subject to additional antidegradation review, if the general permit they apply for coverage under is found to adequately address antidegradation when it is issued. This may not be the case for all general permits, and when a general permit does not adequately address antidegradation, DEQ will have to take that action necessary to meet its obligation for certification under section 401. DEQ does not believe it can rely upon a presumption created by a state rule to defend a certification

	decision. Instead, the legal adequacy of the 401 decision to certify a permit or license will depend upon the terms of the particular permit and the rationale, facts and science relied upon by DEQ. See response to comments by Mark Benson, Potlatch Corporation regarding general permits.
Craig Smith, Vice President, Northwest Food Processors Association NWFPA and its members have been very involved in this rulemaking effort since its inception. This rulemaking has the potential to greatly expand the process and resources required to renew or obtain required Clean Water Act permits. Food processing is a major industry in Idaho. In particular, milk and dairy products, vegetables and potato processing are very important to the economies of many towns and cities in southern Idaho. The ability to obtain wastewater permits in a timely and reasonable manner is crucial for these businesses to remain viable. Failure to do so will make such facilities less competitive in the global marketplace. NWFPA appreciates the need to make sure that our valuable natural resources, such as water quality are protected, however we are concerned that the draft rule has cumbersome regulatory processes that will result in resource intensive administrative processes. We have several recommendations that we believe achieve the needed environmental protection with a practicable regulatory process. **I. Identification of Tier I and Tier II Waters** 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 (High Quality Waters) waters. The proposed rule allows for waters that do not meet water quality standards and associated beneficial uses (water segments classified as categories 4 and 5 in the Integrated Report) to be classified as Tier II waters. I.A. Waters Not Meeting Uses and Impairment Tier II waters are defined as following: "Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water…." [IDAPA 58.01.02.051.02] If a water segment is does not meet standards and associated beneficial uses, it does not make sense for such a water to be classified as a Tier II water per anti-degradation purposes for several reasons. First, the proposed rule elevates the use of "biological data" into the role of being the arbitrator of whether or	While antidegradation review undoubtedly adds to the permitting process, DEQ believes the additional review will in most cases be minimal. In any case, antidegradation is required and without it permits could be challenged. DEQ wants to make sure that does not happen. A listing as impaired (303[d]) does not mean a water body lacks high quality. Waters listed on the 303(d) list are those documented to fail to meet at least one water quality criterion. It is incorrect to conclude from such a listing that that they do not meet all other criteria or necessarily fail to support beneficial uses. For more detail please see response to comments by Alan Prouty, J.R. Simplot Company regarding identification of Tier I and Tier II waters.

not a water body is a Tier I or Tier II water. NWFPA is not aware of any regulatory or technical reason to use biological data as the determining factor as to how water bodies should be treated in regards to antidegradation. Clearly, EPA does not use biological assessment data to remove a stream segment from a 303(d) listing. It is not clear why biological data should be used for changing determinations for "antidegradation" yet not be used for 303(d) listing purposes. DEQ has not provided any technical or regulatory justification for this approach.

Second, the proposed rule has a new definition for "impairment" which apparently means that waters can be "impaired" for § 303(d) listing (including category 4 classification) but are not "impaired" for purposes of identifying them as high quality waters. 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 are appropriate.[1]

[1] The State of Oregon requires that waterbodies must have water quality that meets or is better than all water quality criteria in order to be classified as High Quality Waters (HQW). Thus, the NWPFA recommendation is consistent with an approach taken by other states.

In any event, common sense dictates that if a water body or segment is not meeting a designated beneficial use, then it should not be declared "not impaired" for other purposes. NWFPA does not believe that a special definition of "impairment" is needed.

DEQ believes that a water body by water body approach, which was strongly supported by the majority of the negotiated rulemaking committee, is based upon a review of the overall water quality of a water body. DEQ believes that biological data best reflects overall water quality. In contrast, section 303(d) of the Clean Water Act requires states to include waters on the 303(d) list that violate <u>one</u> or more water quality criteria. This means that waters may be on the list that violate one criteria, but have overall high quality waters.

Finally, the proposed rule states that waters that have not been assessed in the Integrated Report will be "provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license." As stated earlier in this comment letter, one the major concerns with this rulemaking is the creation of a cumbersome regulatory processes that will result in resource intensive administrative processes.

It is not clear at all in the proposed rule as to how such a determination will be made including nor what information will be needed to make such a determination. NWFPA recommends that such waters be classified as Tier I waters unless there is data that shows that classification as Tier II is warranted. Such unassessed waters cannot be identified as Tier II water *as there is no data to support such a determination.* Tier I designation provides for "existing uses and the water quality to protect such uses to be maintained and

Waters that are listed as not assessed in the Integrated Report are there because DEQ lacks information. DEQ agrees this lack of information does not indicate they are of high quality, although our experience has shown that to be the more likely case, but by the same token it does not indicate they fail to meet criteria or support beneficial uses.

When a discharge is proposed on such a water, an unlikely event since most waters are un-assessed due to remoteness and/or small size, DEQ will get the information that would allow assessment. That is no different than information

protected." Thus, a Tier I designation provides protection while additional data is collected to provide a technical basis for designation.	DEQ gathers and uses now to categorize waters currently listed in the Integrated Report. DEQ's assessment process is identified in "Water Body Assessment Guidance (WBAG) II)", and can be found on DEQ's web site here: http://www.deq.idaho.gov/water/data_reports/surface_water/monitoring/overview.cfm#wbag
I.B. Special Resource Waters The proposed rule does not address Special Resource Waters (SRW). NWFPA recommends that each SRW be evaluated and managed for antidegradation purposes the same as any other water segment in Idaho.	While this rulemaking does not address SRWs, existing rule language does. Because SRWs run the gamut of water quality and each is a designation within the water quality standards which reflects considerable public input, DEQ believes properly dealing with SRWs requires a separate rulemaking to fully vet the numerous re-designations this comment suggests.
I.C. List of Waters Protected The proposed rule has the Department not maintaining a list of Tier I or II waters. From an implementation viewpoint, not having such as list will make it more difficult for the regulated community to plan and prepare for the regulatory process of getting a new permit or renewed NPDES permit. NWFPA recommends that DEQ maintain a list of Tier I and II waters.	There is no need for a list of Tier I waters as all waters receive Tier I protection. A list of waters deserving Tier II protection for the entire state would be a resource intensive administrative process and require monitoring on a scale DEQ is unable to muster under current budgets. As a compromise, DEQ can and will develop a list of Tier determinations for waters where there are currently NPDES permitted discharges. See response to comment by Ken Harward, Association of Idaho Cities regarding a list of waters with existing NPDES discharges.
I.D. Recommendations Specific language changes recommended (underline – new language; strikethroughdeleted language):	
01.49 Impairment (delete entire definition)	DEQ has deleted this definition from the proposed rule.
052.01. List of Waters Protected. All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a water body by water body approach during the anti-degradation review. The Department will ~~not~~ maintain a list of Tier I or II waters. Waters given Tier III protection are designated in law.	See DEQ's response above.
052.06. Identification of Tier I and II Waters. The Department will utilize a water body by water body	

approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows. a. Water bodies identified in the Integrated Report as fully supporting assessed uses will be provided Tier II protection. b. Water bodies identified in the Integrated Report as not assessed will be provided Tier I ~~an appropriate~~ level of protection ~~on a case-by-case~~ until ~~basis using~~ information is available to determine whether assessed uses are supported. ~~at the time of a proposal for a new or reissued permit or license.~~ c. Water bodies identified in the Integrated Report as not supporting an assessed use will receive Tier I protection. ~~as follows:~~ ~~i. For aquatic life uses, if biological data show:~~ ~~(1) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~ ~~(2) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~ ~~(3) If biological data are insufficient to determine impairment, then the water body will be provided an appropriate level of protection on a caseby-case basis using information available at the time of a proposal for a new of reissued permit or license.~~ ~~ii. For recreational uses, if water quality data show impairment, then the water body shall receive Tier I protection for recreational uses.~~ **II. Insignificant Discharges** Having a provision for insignificant discharges is very important to the regulated community as it provides that resources of both the regulated community and DEQ are focused on *significant* discharges in terms of the evaluation of antidegradation. NWFPA supports that insignificant discharges should be not subject to Tier II analysis. Also, the criteria should just be "increase ambient concentrations by more than 10 percent." Determining cumulative assimilative capacity can be (for some contaminants) more difficult to determine with certainty as compared to calculating ambient concentrations. NWFPA however does believe that the *insignificant discharges* portion of the rule should be placed in 052.08 **Evaluation of Effect of an Activity or Discharge on Water Quality.** Recommendation 052.~~09.~~a. 08.e. Insignificant Discharge. The Department shall consider the size and character of a discharge or the magnitude of its effect on the receiving stream and may determine that it is insignificant. If a discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections 052.09.b., 052.09.c., and 052.02.d., shall be required.	DEQ does not believe it is defensible to assume waters without data for assessment are of low quality. DEQ does not believe it is proper to equate listing as impaired for one parameter that affects only one of a water bodies multiple uses with lack of high quality water that deserves Tier II antidegradation protection. See DEQ's response above as well as the response to comments by Alan Prouty, J.R. Simplot Company regarding identification of Tier I and Tier II waters. DEQ agrees the provision to forgo Tier II analysis of insignificant discharges is important, both to the regulated community, and to DEQ; that it is prudent to focus our efforts on significant degradation. While DEQ agrees that basing insignificance on ambient quality is easier to implement than basing it on assimilative capacity, DEQ believes EPA will not approve basing insignificance on ambient quality alone. Since evaluation of effect of an 'Activity or Discharge on Water Quality' needs to be done regardless of the Tier of antidegradation that applies, and insignificance is specific to Tier II analysis of necessity and importance, DEQ believes the insignificance provision is in its proper place

i. In no case will the Department determine insignificance when the proposed change in the discharge, from conditions as of July 1, 2011 will: ~~(1) Increase~~ increase ambient concentrations by more than ten percent (10%) after appropriate mixing of the discharge and receiving water; ~~or~~ ~~(2) Cumulatively decrease assimilative capacity by more than tenpercent (10%).~~	in the rule.
III. Tier II – Alternatives Analysis and Socioeconomic Justification The draft rule has detailed procedures for the Alternatives Analysis and Socio-Economic Justification. These procedures seem overly prescriptive and some of the information requested does not seem relevant. For example, d.iii.(3) requests information on "potential health impacts related to the proposed activity. Since, state rules require attainment of beneficial uses and associated standards, it is not clear what "health impacts" DEQ expects to be determined. Standards are designed to be protective of public and ecological health. Thus, if the standards are met (which will always be the case), what impact does DEQ expect the applicant to determine? Is DEQ expecting some type of assessment of the marginal risk due to an increase in the concentration of a contaminant, for which the concentration is still below any applicable standard?	DEQ uses terms like 'where appropriate', 'should', and 'consider' throughout rule sections on Alternatives Analysis and Socio-Economic Justification to temper them and make sure they are reasonable. On the other hand, DEQ has tried to be detailed enough to make it clear what is expected and not leave too much up to later battles over interpretation. DEQ believes there is still ample flexibility in the rule language to develop an analysis that is both reasonable and relevant to a particular discharger's situation. While this comment suggests that the potential health impacts are negative, including the phrase potential health impacts is intended to allow for a description of positive benefits to public health from the proposed activity, e.g., the building or expansion of a local hospital or expanding a wastewater treatment facility to provide coverage to a larger area. DEQ is not expecting a marginal risk assessment to accompany the socio-economic justification rather a detailing of the possible impacts to public health resulting from the activity.
Instead, NWFPA suggests that DEQ adopt language similar to that which is found in the Colorado rule (see Attachment 1) [*Colorado rule is attached to original copy of NWFPA's letter*]. There are significant differences between the two approaches. The Colorado approach also includes a review of costs of potential alternatives and how such costs would impact either the economics of the proposed project or ratepayers (for POTWs). These are very important aspects that need to be considered in the socioeconomic analysis. Recommendation The proposed language in 052.09.c. and d. be replaced by language from the Colorado rule.	The suggested Colorado language appears to provide for a case by case determination based upon evidence submitted by the proponent that the activity is important. However, Colorado's rules do not delineate or detail what constitutes this evidence. In detailing several points to be considered, DEQ has attempted to provide the regulated community with more information and better clarity regarding what would constitute this evidence of importance. In the explanation of Colorado's rules, the commission also states that the determination will take into account all available

IV. Summary. The Antidegradation Rules need to provide a level of review that is commensurate with potential for impact on the environment. 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. NWFPA has provided recommendations that we believe adhere to this principle so as to provide the level of environmental protection needed while providing for a regulatory process that will not be unduly cumbersome. We appreciate the Department's consideration of these comments.	information and recognizes that the possibility may arise where the local community may reject the notion of the project's importance DEQ would like to avoid the fiscal impact to the proponent that may arise from attempting a Tier II analysis that would not have enough information to satisfy the public or the department and force the process to begin again. For this reason, DEQ has outlined some considerations that should be addressed in a social or economic justification, and would prefer to not do wholesale replacement of language that has been negotiated in rulemaking with language that has not. DEQ agrees and believes the rule as written does streamline the process for discharges in which there are no increases in the discharge of a regulated pollutant and also when there is an increase but it is insignificant.
Alex LaBeau, President, Idaho Association of Commerce and Industry **Jack Lyman, Executive Director, Idaho Mining Association** The Idaho Association of Commerce and Industry ("IACI") and the Idaho Mining Association ("IMA") jointly provide these comments to the subject proposed rule. IACI/IMA has been actively involved in the subject rulemaking since it was initiated in April 2010. IACI/IMA attended all six (6) negotiated rulemaking meetings and provided extensive written and verbal comments throughout the negotiated rulemaking. The proposed rule has the potential to greatly expand the process and delay the timing of obtaining Clean Water Act permits and therefore has the potential to significantly affect IACI/IMA members that require Clean Water Act permits to conduct business and provide jobs within Idaho. IACI/IMA's role in the rulemaking has been and continues to be to support a rule that meets the	

requirements of the Clean Water Act without unduly burdening Idaho industry during the Clean Water Act permit process. We believe this is also in keeping with the directive from the Idaho Legislature that IDEQ rules be no more stringent than the requirements in the Clean Water Act. IACI/IMA appreciates IDEQ's efforts during the negotiated rulemaking process in attempting to address our concerns. However, we believe the rule can still be better clarified and refined to avoid costly and burdensome requirements and still meet the requirements of the Clean Water Act.	
First, we believe that waters identified by IDEQ (and approved by EPA) as impaired under the Clean Water Act (303(d) listed waters) should not be treated as Tier II high quality waters. During the rulemaking process, IDEQ noted that some limited subset of § 303(d) listed waters were solely on the § 303(d) list because they exceeded certain criteria such as temperature, but nevertheless fully supported aquatic life uses and were otherwise renown fisheries. An example frequently given by IDEQ was the Lochsa River. We recognize that in certain limited circumstances it may be appropriate for IDEQ to identify a § 303(d) listed water as a possible Tier II water. Irrespective of the example of the Lochsa River, IACI/IMA strongly believe this rulemaking should not establish a dual definition of "impairment." We have recommended changes below which are more in keeping with the unique situation in which a § 303(d) listed water should be considered a Tier II high quality water.	DEQ has deleted the definition of impairment. The fact is a waterbody can be on the 303(d) list for failure to meet just one of many applicable water quality criteria and in all other respects be of high quality. As IACI/IMA points out, such a waterbody can still support designated uses such as cold water aquatic life. DEQ is merely trying to acknowledge the gap between a waterbody being 303(d) listed for exceedance of a criterion and being so impaired as to no longer support a use by direct measure such as bioassessment. It is somewhat akin to the gap in human health between having high blood pressure or high cholesterol and being so sick as to be unable to work.
Secondly, although we appreciate IDEQ's attempt to describe the circumstances under which IDEQ will implement antidegradation for general permits issued by EPA and the U.S. Army Corps of Engineers ("Corps"), we believe this provision requires greater clarity. Because of the manner in which both EPA and the Corps issues general permits we believe it is appropriate for IDEQ to streamline any required Tier II analysis. For example the Corps' undertakes a detailed alternative analysis and required mitigation to ensure that a § 404 Permit has minimal impacts to jurisdictional waters. Similarly, EPA establishes Best Available Control Technology ("BAT") limits in all General Permits. Therefore IACI/IMA believes the rule should provide that IDEQ presumes that the controls required by the federal agencies in general permits are the "least degrading reasonable alternative." We also believe that for certain permits (e.g., MSGP and Construction General Permits) which require permittees to implement measures and practices which minimize or eliminate the discharge of pollutants, that IDEQ can also presume that the impact of discharges under such general permit will be insignificant. Like all presumptions, this could be rebutted during the public comment period on IDEQ's proposed water quality certification of the general permit. We have proposed language below which addresses IACI/IMA's concerns.	While what IACI/IMA suggests may be appropriate for specific general permits DEQ believes the assertion that the Corps undertakes a detailed alternative analysis to be untrue by the Corps own admission for Nationwide Permits - *"The NWPs authorize only those activities that result in minimal individual and cumulative adverse effects on the aquatic environment, and thus do not include a formal process for consideration of less damaging alternatives."*, (72 FR 11092, Monday March 12, 2007 – Reissuance of Nationwide Permits, Notice). Still DEQ intends by its proposed rule language to evaluate general permits at the time of their issuance as to whether they adequately address antidegradation. DEQ does not believe it can rely upon a presumption created in a state rule to defend its decision to certify a general permit. Such a defense will depend upon the terms of the particular permit and the rationale, facts and science relied upon by the agency. DEQ believes reviewing general permits on a case-by-case basis is the only defensible and prudent approach to general permits. See

	response to comment by Mark Benson, Potlatch Corporation regarding general permits.
Thirdly, we believe based on EPA Guidance and case law that the Clean Water Act only requires that states undertake a Tier II analysis for significant degradation. Accordingly, we have proposed changes to the proposed rule which address this issue, including a clarification that a Tier II analysis shall not be required for discharges resulting in insignificant impacts. IACI/IMA does not believe it is appropriate for IDEQ to nevertheless retain discretion to require a Tier II analysis for insignificant discharge as is currently provided in the proposed rule.	DEQ would say the Clean water Act and EPA regulations are silent on the use of insignificance, but that the courts have allowed it. DEQ has incorporated this concept into the rule and believe it is clear as written that alternatives analysis and socio economic justification will only be done for significant discharges to high quality (Tier II) water.
Fourth, IACI/IMA believes that IDEQ must address how it will address Special Resource Waters in the proposed rule. IACI disagrees that how SRWs should be addressed under antidegradation is beyond the scope of the subject proposed rule. IDEQ's initial Notice of Intent to promulgate rules published in the Idaho Administrative Bulletin (April 7, 2010) was clear that the scope of the rule applied to all surface waters and the "various levels of protection" each water body would receive under the antidegradation policy. Moreover, IDEQ's first draft of the rule specifically proposed to treat SRWs as Tier II and 1/2 waters. IACI strongly believes that SRWs must be addressed in the proposed rule. As IACI/IMA has maintained throughout the rulemaking in written and oral comments, SRWs should be either Tier I or Tier II waters depending upon the documented water quality in these waters. If an SRW is meeting water quality standards it should be a Tier II water; if an SRW is a § 303(d) listed water it should be a Tier I water. IACI/ IMA again urges IDEQ to address this issue in this rulemaking.	While SRWs maybe within the scope of the current rulemaking, DEQ believes fully vetting the many re-designations that would be needed to parse existing SRW designation into the appropriate Tier of protection as described in Idaho's antidegradation policy would take many more negotiated rulemaking meetings and is therefore best left to a separate rulemaking effort. See also response to Ken Haward, Association of Idaho Cities, regarding SRWs.
Fifth, we believe use of the phrase "activities" in the proposed rule has the potential to require regulation of activities not required under the Clean Water Act. Also, we are concerned about use of the terms "critical conditions" and "design flow" in the proposed rule and how it might affect mixing zones. Therefore we have recommended changes to the rule to clarify these issues.	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 US 370 (2006). In addition, the U.S. Supreme Court in PUD No.1 of Jefferson County v. Washington, 511 US 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. The changes suggested by IACI would limit the state's review to impacts directly related to point source discharges only and therefore are not consistent with the scope of section 401. On the other hand, DEQ believes that the language it has

	chosen fully implements, but does not go beyond, the authority granted the state in the Clean Water Act. Nevertheless, DEQ has added additional language to ensure clarity in the scope of its antidegradation rule. Mention of critical conditions merely acknowledges the formulation of toxics criteria and how they are applied. Mention of design flow focuses our analysis on the quantity of discharge that a permit authorizes, which may be more than is currently discharged.
Sixth, IACI/IMA is concerned that the socio-economic justification and alternatives analysis is too prescriptive. Further we are concerned about how IDEQ might implement the so called "socioeconomic justification" in a Tier II analysis for historical activities. For example, for many activities in Idaho, such as mining and silviculture, it is often necessary to discharge stormwater and other waters long after the commercial activity has occurred. We are concerned that the proposed rule does not properly take this unique situation into account. We have proposed changes to the rule to address these issues.	While DEQ acknowledges the rule language regarding socio-economic justification and alternatives analysis is detailed, DEQ uses phrases like 'where appropriate', 'should', and 'consider' throughout these rule sections to temper them and make sure they are reasonable. DEQ believes there is ample flexibility in the rule language to develop an analysis that is both reasonable and relevant to a particular discharger's situation. DEQ understands your point about historical activities that may still be discharging after their economic output has ceased. DEQ believes that remediation activities at closed facilities, such as mines, may implicate important social development, and as such should fit within the current rule language. For example, a discharge associated with remediation activities may result in important social, environmental and health benefits, all of which are factors described in section 09.d of the rule.
Finally, we are concerned that many existing discharges which have previously been authorized under federal law (e.g. superfund) or which were not previously regulated by EPA but recent court decisions now require Clean Water Act permits, might be subject to a full antidegradation review. We have suggested changes to the proposed rule to address this issue.	DEQ agrees that existing activities that have not previously required a permit or license should not be treated as a new discharge or activity. DEQ has made changes to the definitions of existing activity or discharge and new activity and discharge to clarify this.
Specific Comments The following are IACI/IMA's specific comments to the rule in redline/strikeout format. **010. DEFINITIONS.** **01. Activity**. For purposes of antidegradation review, an activity that causes a discharge to a water subject to the jurisdiction of the Clean Water Act.	DEQ has reviewed IACI/IMA's suggested additions and changes to definitions of activity, discharge, and permit or license. DEQ believes that in sum these changes are not necessary, would unduly limit the purview on

	antidegradation to just traditional point source discharges, and would limit or preclude DEQ's legitimate review of FERC licenses. DEQ has, however, added language in an attempt to make it clearer that it intends to apply antidegradation just to those activities to which section 401 applies.
02. Restoration Projects. Changes in water quality may be allowed by the Department without an antidegradation review where determined necessary to secure long-term water quality improvement through restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished. Such projects include actions taken under CERCLA, 42 USC § 9601 et seq. and other ~~or~~ state administrative or voluntary orders.	Typically there are no federal permits or licenses involved in CERCLA actions, so our antidegradation review would not be triggered, and therefore, this language is not necessary. Also, while it is possible, DEQ cannot *a priori* say that any action taken under CERCLA or under a state administrative or voluntary consent order would constitute a restoration project Such projects shall be reviewed by the state on a case-by-case basis.
04. Assigned Criteria. Criteria associated with the designated and any existing uses from Section 100 of these rules.	DEQ agrees this is a good change to the rule. See final rule text.
26. Discharge. When used without qualification, any spilling, leaking, emitting, escaping, leaching, or disposing of a pollutant into the water of the state. For purposes of implementing the antidegradation policy at Section 051, means the addition of a pollutant to a water of the United States from a point source.	See DEQ comments above regarding changes to the definition of discharge. As noted, IACI's suggested change is not consistent with the use of "discharge" in section 401 of the CWA, which is a term that is broader than the addition of a pollutant to waters of the U.S.
18. Degradation or Lower Water Quality. For purposes of antidegradation, degradation or lower water quality means a significant change in concentration of a pollutant that is measurable and adverse to beneficial uses of the water, as calculated at the edge of the mixing zone.	There is degradation and then there is significant degradation. The gap is insignificant degradation. The proposed rule at 052.09.b speaks in detail to insignificant degradation, so there is no need to define degradation as only that which is significant. DEQ is proposing modification of this definition in response to other comments; removing the mention of measurable (see response to comment by Justin Hayes, Idaho Conservation League, regarding measurable). DEQ is proposing legislation to address the statutory definition of lower water quality as well and align it with our rule proposal.

35. Existing Activity or Discharge. An activity or discharge that has been previously authorized under state or federal law or a discharge for which the applicable federal agencies did not previously require a permit or license.	
49. Impairment. **a.** For the purpose of determining the appropriate level of antidegradation protection, impairment means:	DEQ has removed the definition of impairment form the proposed rule.
i. For aquatic life uses, non-compliance with those levels of water quality criteria listed in Sections 200, 210, 250 and 275 (as applicable), unless the Department determines based on available data that no major biological groups such as fish, macroinvertebrates, or algae necessary to support the fishery has been modified by human activities significantly beyond the natural range of the reference streams or conditions approved by the Director in consultation with the appropriate basin advisory group; and	
b. The Department may utilize the current version of the "Water Body Assessment Guidance" as published by the IDEQ, as a guide in making impairment decisions.	
65. New Activity or Discharge. An activity or discharge that has not been previously authorized. Existing activities or discharges for which EPA, the Corps of Engineers or FERC had required a permit or license and which are not currently permitted, licensed or granted an authorization, will be presumed to be new unless the Director determines to the contrary based on review of available evidence.	
75. Permit or License. A permit for a discharge to waters of the United States or license for an activity that is subject to certification by the state under Section 401 of the Clean Water Act, including NPDES permits, dredge and fill permits, and FERC licenses.	
051.06 Discharges and Activities. Idaho's antidegradation policy only applies to discharges and activities subject to a permit or license.	
052. IMPLEMENTATION.	
04. General Permits. For general permits issued on or after July 1, 2011, the Department will conduct 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	DEQ does not believe a 401 certification of a general permit's compliance with water quality standards can be based on the presumptions IACI/IMA is suggesting. DEQ has modified the proposed rule to add IACI/IMA's suggestion of adding the phrase "the Department determines". DEQ has also included IACAI/IMA's proposed final sentence regarding insignificance, replacing

the general permit to provide reasonable assurance of compliance with the antidegradation policy. The Department will presume that general permits issued by EPA and the U.S. Army Corps of Engineers impose the least degrading reasonable alternative to minimize degradation consistent with 052.09.c. of these rules. If supported by the permit record, the Department may also presume that discharges authorized under a general permit are insignificant.	'presume' with 'conclude'. See response to comment by Mark Benson, Potlatch Corporation and Justin Hayes, Idaho Conservation League regarding general permits.
06. Identification of Tier I and Tier II Waters. The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological, and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows:	
a. Water bodies identified in the Integrated Report including water bodies designated as special resource waters as supporting assessed uses will be provided Tier II protection.	DEQ does not believe it is appropriate to address SRWs in this manner. Rather a separate rulemaking is needed to fully consider the ramification to all the SRW designations this implies and discuss removal of the current language in the WQS governing the change in quality of SRWs. See response to comments by Ken Haward, Association of Idaho Cities, regarding SRWs.
c. Water bodies identified in the Integrated Report including water bodies designated as special resource waters as not supporting an assessed use will receive protection as follows:	
i. For aquatic life uses ~~if biological data show~~:	
(1) ~~Impairment, then t~~The water body shall receive Tier I protection for aquatic life unless there is biological data (as defined in Section 01.49) showing no impairment~~; or~~	This could not happen, that is, DEQ can not remove a waterbody from the 303(d) list if there is a violation of criteria, even just one criterion, even if biological data show aquatic life is healthy. In response to comments, DEQ has modified its approach to determining the level of antidegradation protection provided water bodies.
~~(2) No impairment,~~ then the water body shall receive Tier II protection for aquatic life once the water body is removed from an impaired status in the Integrated Report~~; or~~.	
~~(3) If biological data are insufficient to determine impairment, then the water body will be provided an appropriate level of protection on a case by case basis using information available at the time of a proposal for a new or reissued permit or license.~~	DEQ continues to believe that biological and aquatic habitat parameters, rather than criteria applicable to individual pollutants, best reflect the overall water quality of a water body for support of aquatic life uses. DEQ believes that this is particularly the case with respect to dissolved oxygen, nutrients, pH, sediment and temperature. Given the wide natural variation of these water quality parameters, and the conservative nature of criteria, DEQ's experience shows that a violation of criteria applicable to these pollutants may not reflect the overall health of the water body. The WQS already provide that when determining whether a water body is fully supported or not, DEQ may,

in certain circumstances, provide less weight to departures from criteria for pH, turbidity, dissolved oxygen and temperature when aquatic habitat and biological data show that aquatic life uses are fully supported. Thus, DEQ has modified the proposed rule so that all waters on the 303(d) list will receive Tier I protection, with the following exception: waters impaired only for exceeding criteria for the listed parameters may still be provided Tier II protection for aquatic life if the biological and aquatic habitat parameters show a healthy, balanced biological community is present.

07. Tier I Review. Tier I review will be performed for all new or reissued permits or licenses. Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected. No degradation or lowering of water quality may be allowed that would cause or contribute to violation of water quality criteria as calculated after appropriate mixing of the discharge and receiving water.

DEQ believes that determining whether a discharge will cause or contribute to a violation of criteria should be calculated after mixing authorized by DEQ. Therefore, with a slight modification, DEQ agrees to make the suggested change.

Also, it appears that 07.a. and 07.b. are redundant and unnecesssary and therefore we recommend they be deleted.

Although DEQ does not agree that 07.a and b are redundant and unnecessary, DEQ has deleted these subsections.

08. Evaluation of Effect of an Activity or Discharge on Water Quality. The Department will evaluate the effect on water quality for each ~~parameter of concern~~ pollutant. The Department will determine whether an activity or discharge results in an improvement, no change, or degradation of water quality.

Although pollutant is a broader term than parameter of concern, DEQ has made the suggested substitution of 'pollutant' for 'parameter of concern'. DEQ did this because parameter of concern is not defined.

a. Effect on water quality will be based on the calculated change in concentration in the receiving water as a result of a new or reissued permit or license. With respect to a discharge, this calculation will take into account dilution using appropriate mixing of the receiving water ~~under critical conditions coupled with the design flow of the discharge~~. For a reissued permit or license, the calculated change will be the difference in water quality that would result from the activity or discharge as authorized in the current permit or license or other authorization and the water quality that would result from the activity or discharge as proposed in the reissued permit or license. For a new permit or license, the calculated change will be the difference between the existing receiving water quality and water quality that would result from the activity or discharge as proposed in the new permit or license.

As noted above, DEQ believes mention of critical conditions and design flow is appropriate and informative of what DEQ will do. Design flow represents what a discharge is allowed to discharge and this may be more than is currently discharged. Water quality based effluent limits are always based on extreme conditions that result in minimal mixing consistent with formulation of most toxics criteria which for aquatic life are based on criteria being exceeded not more than once in three years.

iii. New Permit Limits for an Existing Discharge. When new permit limits are proposed for the first time for a ~~parameter of concern~~ pollutant in an existing discharge, then for purposes of calculating the

DEQ believes that the IACI/IMA's suggested language is already covered in subsection a of this section of the

change in water quality, the Department shall determine whether the proposed permit will result in any increase in the discharge of a pollutant above what has ~~pollutant had~~ been discharged in the past. The Department will use any statistical procedures used to derive the proposed new limits will be applied to the current discharge quality as well, where appropriate.	proposed rule.
c. Offsets. In determining the effect of an activity or discharge on water quality of Tier II or Tier III waters, the Department may take into account reductions in pollution from other sources ~~that are tied to the proposed activity or discharge~~. These offsets in pollution must be within the same water body as the ~~upstream of the degradation in water quality due to the~~ proposed activity or discharge ~~and occur before the activity or discharge is allowed to begin~~. The applicant seeking a permit or license for an activity or discharge based on offsets will be held responsible for assuring offsets are achieved and maintained ~~as a condition of their permit or license~~.	These changes will not work as they do not assure there will not be localized degradation of water quality or that offsets will be maintained.
e. Mixing Zone. Mixing Zones will be provided in accordance with Section 060.	DEQ does not believe this new subsection is needed as the WQS are already clear that mixing zones are to be set in accordance with section 060. The mixing zone provisions limit mixing so as to limit the portion of a water body that is allowed to exceed water quality criteria. Such partial mixing does not reflect the ultimate change in water quality resulting from a discharge that is the subject of antidegradation.
09. **Tier II Analysis**. A Tier II analysis will only be conducted for activities or discharges, subject to permit or a license, that cause significant degradation. The Department may allow significant degradation of surface water quality that is better than assigned criteria only if it is determined to be necessary to accommodate important economic or social development in the area in which the waters are located. The process and standard for this determination are set forth below.	DEQ believes that determining whether degradation is significant is part of the Tier II analysis, but agrees that once determined insignificant, no further analysis is required, i.e., the alternative analysis and social and economic justification are only required for significant discharges. DEQ agrees to the addition of the word "assigned".
a. **Insignificant Discharge**. The Department shall consider the size and character of a discharge or the magnitude of its effect on the receiving stream and ~~may~~ shall determine ~~that~~ whether it is insignificant. If a discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections 052.09.b., 052.09.c., and 052.09.d., shall be required.	DEQ agrees to the changes suggested by IACI/IMA to 09.a.
i. ~~In no case will the Department determine i~~Insignificant~~e~~ discharges are those which ~~when the proposed~~ change ~~in~~ assigned criteria ~~discharge,~~ from conditions as of July 1, 2011, and which will:	Use of assigned criteria does not make sense, criteria can only be changed through rulemaking. While DEQ agrees that basing insignificance on ambient quality is easier to implement than basing it on assimilative capacity, DEQ
(1) Increase ambient concentrations by more than ten percent (10%) as calculated at the edge of	

the mixing zone; ~~or~~ ~~(2) Cumulatively decrease assimilative capacity by no more than ten percent (10%).~~ **b. ~~Other~~ Source Controls**. In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the waterbody ~~watershed~~ the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source controls. In providing such assurance, the Department may enter together into an agreement with other State of Idaho or federal agencies in accordance with Sections 67-2326 through 67-2333, Idaho Code. **c.** ~~Alternatives Analysis~~Degradation Deemed Necessary. ~~Degradation will be deemed necessary only if there are no reasonable alternatives to discharging at the levels proposed.~~ The applicant seeking authorization to degrade high water quality must provide an analysis of alternatives aimed at selecting the best combination of site, structural, managerial and treatment approaches that can be reasonably implemented to avoid or minimize the degradation of water quality. To identify the least degrading alternative that is reasonable, the following principles ~~shall~~ may be followed: **d. Socioeconomic Justification**. Degradation of water quality deemed necessary must also be determined by the Department to accommodate important economic or social development. In evaluating socioeconomic justification, the Department shall consider the overall economic effect of the proposed discharge or activity including past economic and social development as well as the reasonable costs to protect the beneficial uses of the water body. Therefore, the applicant seeking authorization to degrade water quality must at a minimum identify the important economic or social development for which lowering water quality is necessary and ~~should~~ may use the following steps to demonstrate this: **e. Process**. **iii.** Public Involvement. The Department will satisfy the public participation provisions of Idaho's continuing planning process ~~and, to the extent possible,~~ . ~~p~~Public notice and review of antidegradation will be coordinated with existing 401 certification notices for public review. Thank you for the opportunity to comment on the proposed rule. IACI/IMA will closely monitor this rule when it is submitted to the Board and the Idaho Legislature for approval.	believes EPA will not likely approve basing insignificance on ambient quality alone. DEQ also knows that the rule needs a cumulative cap. DEQ agrees that its review of other source controls relates to controls that affect the water body to be degraded. But, BMPs for nonpoint sources are not generally applied directly in the water body, but instead are applied in the watershed in which the water body is located. Therefore, watershed is the more appropriate term to use. Deletion of the first sentence removes the heart of what necessity of degradation is about. DEQ believes the current language covers closed facilities, that clean up of closed facilities is easily justified as being of social importance. See earlier response to IACI/IMA comments regarding socioeconomic justification above. DEQ intends to provide further clarification in guidance. DEQ agrees with this suggestion and has incorporated it in the modification to the proposed rule.
Robert Boeh, Idaho Forest Group Please accept these comments on behalf of Bennett Forest Industries, Riley Creek and Idaho Forest Group. As the owner of over 25,000 acres of forest land and 4 world class lumber manufacturing plants in Idaho, we	

are fully supportive of the rule recognizing that practices pursuant to the Forest Practices Act are "cost effective and reasonable BMP's for non-point sources". We also offer the following perspective. 1) Any changes for future permit requirements covering forestry activities should be covered as part of baseline conditions and not as new permits. This could best be accomplished by clarifying the definition of existing activity or discharge.	DEQ agrees and has made appropriate changes to the definitions. DEQ believes it is possible to consider existing roads and forestry activities to be part of the baseline conditions using the discretion provided by the definition of new discharges.
2) We support including flexibility in the rule to allow for streamlined antidegradation review in conjunction with any needed general permits in the future.	DEQ has strived to do so.
3) We have reviewed and support the September 30, 2010 comments submitted by IACI. We specifically feel SRW's need inclusion. Thank you for the opportunity to comment and let us know if you have any questions.	DEQ agrees SRWs are an important part of antidegradation, but believe the disposition of currently designated SRWs can not be summarily addressed in this rulemaking, but rather that further discussion is needed, in future rulemaking.

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 4/22/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone participation		
Brian Nickel	EPA	
Sonny Buhidar	DEQ – Twin Falls	
Robert Steed	DEQ – Coeur d'Alene	
Justin Hayes	ICL	jhayes@idahoconservation.org
Isaac Tucci	Advocates for the West	ttucci@advocatswest.org
Barry Burnell	IDEQ	barry.burnell@deq.idaho.gov
Larry Pennington	North Side Canal Co	lpennington@cableone.net

Boise 4/22/10

Name	Affiliation	E-Mail Address
Steve Covy	Self	stcory@q.com
Carolyn Firth	Id. Soil Conservation Commission	Carolyn.Firth@agri.idaho.gov
JOHN EATON	REALTORS	jeaton@idahorealtors.com
Linda Lemmon	Idaho Aquaculture Assoc.	jaa@northrim.net

Boise 4/22/10

Name	Affiliation	E-Mail Address
Bill Holder	Strata	wholder@stratageotech.com
Dan Ayers	B+C	dayers@bruncald.com
John Prigge	Sorrento Lactalis	John.Prigge@Lactalis.us
Allegra Belknap	Monsanto	allegra.g.belknap@monsanto.com
George Bacon	Dept Lands	gbacon@idl.idaho.gov
Jack Lyman	Idaho Mining Assoc	ima@idahomining.org
Kevin Beaton	Stoel Rives	KJBeaton@stoel.com
Falma Moye	Hecla	fmoye@hecla-mining.com
Steve West	Centra Consulting Inc.	swest@centrainc.com

Boise 4/22/10

Name	Affiliation	E-Mail Address
PATRICK CLARK	CALCASTLE MATERIALS	PCLARK@STAKERPARSON.COM
DENNIS TANIKUNI	IDAHO FARM BUREAU FEDERATION	dtanikuni@idahofb.org
Sue Sullivan	Idaho Transportation Dept	sue.sullivan@itd.idaho.gov
Brad Wolfinger	Idaho Trans. Dept.	brad.wolfinger@itd.idaho.gov
Mary Anne Kosterman	Idaho DEQ	mary.anne.kosterman@deq.idaho.gov
Johnna Sandow	Idaho DEQ	Johnna.Sandow@deq.idaho.gov
Don Essig	DEQ	Don.Essig@DEQ.Idaho.gov
Tim Kennedy	IDL	tkennedy@idl.idaho.gov
Peter Barton	Givens Pursley LLP	peterbarton@givenspursley.com

Boise 4/22/10

Name	Affiliation	E-Mail Address
Erika Malmen	Perkins Coie / Intermountain Forest Assoc.	emalmen@perkinscoie.com
GLEN HOLDREN	KELLER ASSOCIATES	GHOLDREN@KELLERASSOCIATES.COM
Albert P Barker	BIS	apb@idahowaters.com
Sarah Higer	BKS	SWH@idahowaters.com
Pat Barclay	ICIE	pat barclay@icie.org
Brenda Tominaga	IGWA + IRWA	btominaga@hotmail.com
FRITZ DURHAM	OLYMPUS TECHNICAL SERVICES	FDURHAM@OLYTECH.COM
NORM SEMANKO	Idaho Water Users Association	norm@iwua.org
BRUCE SMITH	Moore Smith Buxton Turcke	bms@msbtlaw.com

Boise 4/22/10

Name	Affiliation	E-Mail Address
Larry Rupp	Keller Associates	lrupp @ kellerassociates.com
ANDY BRUNELLE	US Forest Service	abrunelle@fs.fed.us
Larry Bennett	Bennett Engineering City of Nampa	L.d.bennett.engineering • gmail.com
Wyatt Prescott	Idaho Cattle Assoc	wyatt@idahocattle.org
AlexLaBeau	IACI	alabeau@iaci.org
Jayson Ronk	IACI	jronk@iaci.org
CHRIS MEBANE	Self	
Bill Beckwith	EPA - Seattle	beckwith.william@epa.gov

Boise 4/22/10

Name	Affiliation	E-Mail Address
LISA MACCHIO	U.S EPA Seattle	macchio.lisa@epa.gov
AJ MAUPIN	IDEQ, WASTEWATER PROGRAM	aj.maupin@deq.idaho.gov
JACK HARRISON	HyQUAL	HyQUAL@CABLEONE.NET
Bob Geddes	State Senate District 31	Hgeddes@Senate.$Idaho.gov
JOHN TIPPETS	AGRIUM	JTIPPETS@AGRIUM.COM
Marti Bridges	IDEQ, Surface Water Program	marti.bridges@deq.idaho.gov
Olga Cuzmanov	DEQ	olga.cuzmanov@deq.idaho.gov
Robbin Finch	Boise City / Assoc of Id Cities	rfinch@cityofboise.org
Tom Dupuis	CH2M Hill	tom.dupuis@ch2m.com

Boise 4/22/10

Name	Affiliation	E-Mail Address
Hugh O'Riordan	Givens Pursley, LLP	wito@givenspursley.com
Suzanne Budge	SBS Assoc LLC	sbs@sbsidaho.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 4/22/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Kyle Steele	City of Moscow, ID	KSteele@ci.moscow.id.us
Larry Runkle	landowner	lrunkle@hoparealty.idaho.com
Bob Tridle	Environmental Technical Services	bobtridle@gmail.com
Kristin Keith	DEQ	
PATRICK SEYMOUR	Id. Dept of Lands	
Joel Clark	IDL.	jclark@idl.idaho.gov

CdA 4/22/10

Name	Affiliation	E-Mail Address
Bob Steed	DEQ	
Paul Klatt	JUB Engineers	pklatt@jub.com
Mark Solomon	ICL / CBAG	msolomon@moscow.com
Bruce Cyr	Jackson Land Co.	brucec@rivenbendcp.com
Mike Neher	CPF	mneher@postfallsidaho.org
June Bergquist	DEQ	

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 4/22/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Lynn Van Every	IDEQ- Pocatello	lynn.vanevery@deq.idaho.gov
Claudia Cottle	Bear Lake Watch	bearlakewatch@aol.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 5/12/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone participation Jennifer Harris, Nez Perce Tribe Larry Zuckerman, Western Watersheds Project ~~Allegra Bednar, Monsanto~~ Michael Fuss, City of Nampa		fussm@cityofnampa.us
STEVE WEST	CENTRA	on file
Bob Geddes	Idaho Senate	
Larry Pennington	North Side Canal Co + Idaho Water Users Assn.	lpennington@cableone.net
Steve Cory	Citizen	stcory@q.com

Boise 5/12/10

Name	Affiliation	E-Mail Address
Justin Hayes	ICL	jhayes@idahoconservation.org
Brenda Tominaga	IRWA	btominaga@hotmail.com
Pat Barclay	ICIE	patbarclay@icie.org
JACK LYMAN	IDAHO MINING ASSOCIATION	
Kevin Beaton	STOEL RIVES	
ROBBIN Finch	BOISE City / Assoc to Cities	
ANDY BRUNELLE	US Forest Service	abrunelle@fs.fed.us
Hugh O'Riordan	Givens Pursley LLP	wito@givenspursley.com
Lynn Tominaga	Idaho Groundwater Approp.	lynn_tominaga@hotmail.com

Boise 5/12/10

Name	Affiliation	E-Mail Address
Sarah Higer	Barker Rosholt + Simpson	SWH@idahowaters.com
CHRIS MEBANE	Self	
Brad Wolfinger	ITD	brad.wolfinger@itd.idaho.gov
DAN AYERS	Brown + Caldwell	dayers@browncald.com
BRUCE SMITH	MSBT	bms@msbtlaw.com
NORM SEMANKO	IWUA	norm@iwua.org
Sam Routson	(for) Idahoan Foods, LLC	greatsam@usfds.com
BILL HOLDER	STRATA	wholder@stratagrotech.com

Boise 5/12/10

Name	Affiliation	E-Mail Address
PAT CLARK	OLDCASTLE MATERIALS	PCLARK@STAKERPARSON.COM
JEREMY PISCA	RISCH. PISCA, PLLC	jpisca@rischpisca.com
MARK DUNHAM	IDAHO ASSOCIATED GENERAL CONTRACTORS	mdunham@idahoagc.org
Carolyn Firth	ID Soil Conservation Commission	Carolyn.Firth@agri.idaho.gov
Larry Bennett	Bennett Engineering / City of Nampa	L.J.Bennett.engineering@gmail.com
DAVID HYAMS	Holland + Hart, LLP	dmhyams@hollandhart.com
Linda Lemmon	Idaho Aquaculture Assn.	iaa@northrim.net
DENNIS TANIKUNI	IDAHO FARM BUREAU FED.	dtanikuni@idahofb.org
John Rippets	Agrium	

Boise 5/12/10

Name	Affiliation	E-Mail Address
Don Essig	DEQ	
Doug Conde	ID-AG	douglas.conde@deq.idaho.gov
Jayson Ronk	IACI	
Bill Beckwith	EPA	Beckwith.william@epamail.epa.gov
Jack Harrison	Hy Qual	
Jon Gould	Ringert Law	jon@ringertlaw.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 5/12/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
ARA ANDREA	IDAHO DEPT of LANDS	aandrea@idl.idaho.gov
Jana McDonald	CPM Development Corp.	jmcdonald@oldcastlematerials.com
FALMA Moye	Hecla	fmoye@hecla-mining.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 5/12/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Lynn Van Every	IDEQ	lynn.vanevery@deq.idaho.gov
Claudia Cottle	Bear Lake Watch	bearlakewatch@aol.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/2/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone Participation Rick Hopson, Forest Service Jenifer Harris, Nez Perce Tribe		
Justin Hayes	ICL	on file
Barry Burnell	IDEQ	barry.burnell@deq.idaho.gov
Bob Geddes	Idaho State Senate.	on file.
Pat Barclay	ICIE	

Boise 6/2/10

Name	Affiliation	E-Mail Address
Lynn Tominaga	Idaho Ground Water Appl.	
Sarah Higer	Barker Rosholt Simpson	
Alma Hasse	I.C.A.R.E.	IDAHOCARE@YAHOO.COM
Brad Wolfinger	ITD	
Norm Semanko	Idaho Water Users Assoc.	nSemanko@iwua.org
Patrick Clark	Oldcastle Materials	
Mark Cecchini Beaver	Idaho Attorney General's Office	
Cully Bekkedahl	Idaho Water Users Association	
David Hyams	Holland & Hart	

Name	Affiliation	E-Mail Address
Brenda Tominaga	IRWA	—
Bill Beckwith	EPA	
Robbin Finch	Boise City / Assoc of Idaho Cities	
John Tippets	Agrium	
Jack Lyman	Idaho Mining Assoc.	
Kevin Beaton	Stoel Rives	
Suzanne Budge	SBS Assoc. LLC	
Hugh O'Riordan	Givens Pursley, LLP	
John Eaton	Realtors	

Boise 6/24/10

Name	Affiliation	E-Mail Address
Lee J. Van De Bogart	City of Caldwell	lvandebogart@ci.caldwell.id.us
LIZ PAUL	IDAHO Rivers United	liz@idahorivers.org
Larry Bennett	Bennett Engineering + City of Nampa	on file
Tom Dupuis	CH2M Hill	tom.dupuis@ch2m.com
Mike Trabert	City of Twin Falls	mtrabert@TFID.org
Larry Pennington	North Side Canal Co + Idaho Water Users Assoc.	
Don Essig	Idaho DEQ	
Doug Conde	Idaho A.G.'s office	
Johnna Sandow	DEQ	

Boise 6/2/10

Name	Affiliation	E-Mail Address
Kevin Ryan	STRATA	KRyan@stratageotech.com
Wyatt Prescott	Idaho Cattle	wyatt@idahocattle.org
JACK HARRISON	Hy Qual	HyQual@CABLEONE.NET
DAN AYERS	BROWN + CALDWELL	dayers@brwncald.com
Steven Cory	Self	stcory@q.com
Carolyn Firth	Idaho Soil Conservation Commission	Carolyn.Firth@id.usda.gov
DENNIS TANIKUNI	Idaho Farm Bureau	dtanikuni@idahofb.org
GLEN HOLDREN	KEALEN ASSOCIATES	GHOLDREN@KEALENASSOCIATES.COM
Sara Schmidt	SCC	✓

Name	Affiliation	E-Mail Address
Sam Rantson	(For) Idahoan Foods, LLC.	

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/2/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Lynn Van Every	DEQ – Pocatello	lynn.vanevery@deq.idaho.gov
Claudia Cottle	Bear Lake Watch	Bearlakewatch@aol.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/2/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
DAVID SIMS	City of Bonners Ferry	dsims@bonnersferry.id.gov
Stephen Smith	Idaho Dept. of Lands	ssmith@idl.idaho.gov
Paul Klatt	JUB Engineers	pklatt@jub.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/15/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone participation: Ken Windram,	Hayden Area Regional Sewer Board	
Paula Wilson	AG/DEQ	
Don Essig	DEQ	
Jack Harrison	Hy Qual	

Boise 6/15/10

Name	Affiliation	E-Mail Address
Barry Burnell	IDEQ	barry.burnell@deq.idaho.gov
Bill Beckwith	EPA	
Robbin Finch	Boise City/AK	rfinch@cityofboise.org
STEVE WEST	CENTRA CONSULTING	swest@centrainc.com
Kevin Beaton	STOEL RIVES	KJBeaton@STOEL.com
FALMA Moye	HECLA -	Fmoye@hecla-mining.com
PAT CLARK	OLDCASTLE	PCLARK@STAKERPARSON.com
LIZ PAUL	Idaho Rivers United	liz@idahorivers.org
Lynn Tominaga	Idaho Groundwater Appl.	lynn_tominaga@hotmail.com

Boise 6/15/10

Name	Affiliation	E-Mail Address
Sarah Higgs	Barker Rosholt + Simpson	sarh@Idahowaters.com
Brad Wolfinger	ITD	
Dan AYERS	BOE	
Suzanne Budge	SBS Associates	
Mark Ceccini Beaver	Idaho Attorney General's office	
Jon Caton	City of Twin Falls	jcaton@tfid.org
Mike Trabert	City of Twin Falls	
Brenda Tominaga	IRWA	btominaga@hotmail.com
David Hyams	Holland + Hart	

Boise 6/15/10

Name	Affiliation	E-Mail Address
Pat Barclay	ICIE	patbarclay@icie.org
Lee J. Van DeBogart	city of Caldwell	lvandebogart@ci.caldwell.id.us
Lawrence (Larry) Bennett	Bennett Engineering & City of Nampa	l.d.bennett.engineering@gmail.com
Tom Dupuis	CH2M Hill	tom.dupuis@ch2m.com
Larry Pennington	Idaho Water Users & North Side Canal Co	lpennington@cableone.net
MaryAnne Kosterman	DEQ	
Doug Conde	DEQ-AG	
Johnna Sandow	DEQ	

Boise 6/15/10

Name	Affiliation	E-Mail Address
Cathy Beckendorf	IWUA	intern
Norm Semanko	IWUA	
Steven Cory	Citizen	stcory@q.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/15/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Tim Closson	Kootenai-Pend Oreille Sewer District AND Pend Oreille Clean Water Alliance	Tim.Closson@NCTV.com
Mike Neher	City of Post Falls mneher@postfallsidaho.org	←
DAVID SIMS	City of Bonners Ferry	Dsims@bonnersferry.ID.gov
Paul Klatt	JUB Engineers, Inc.	pklatt@jub.com

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 6/15/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Carolyn Firth	Idaho Soil and Water Conservation Commission	Carolyn.Firth@id.usda.gov
Lynn Van Every	IDEQ – Pocatello	lynn.vanevery@deq.idaho.gov

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 7/8/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone participation: Falma Moye	Hecla	
Paula Wilson	AG / DEQ	
Mary Anne Kosterman	DEQ	
Don Essig	DEQ	
Bill Beckwith.	EPA	

Boise 7/8/10

Name	Affiliation	E-Mail Address
Jayson Ronk	IACI	ronk@iaci.org
JOHN EATON	REALTORS	
PATRICK CLARK	OLDCASTLE MATERIALS	PCLARK@STAKERPARSON.COM
KEVIN BEATON	STOEL RIVES IMA	
JOHN TIPPETS	AGRIUM	
Sarah Higgins	SBS	
Hugh O'Riordan	Givens Pursley LLP	[illegible]@Givenspursley.com
Suzanne Budge	SBS Associates Thompson Creek Metals	sbs@sbsidaho.com

Boise 7/8/10

Name	Affiliation	E-Mail Address
Mark Cecchini Beaver	ID Atty. General	
Brad Wolfinger	ITD	
ANDY BRUNELLE	US Forest Service	
Norm Semanko	Idaho Wtr Users Assoc.	
Brenda Tominaga	Idaho Rural Water Assoc	
Linda Lemmon	Idaho Aquaculture Assn.	
LIZ PAUL	IDAHO RIVERS United	
Robbin Finch	Boise City / Assoc of Idaho Cities	
NICK SMITH	MWH	nickolas.g.smith@mwhglobal.com

Boise 7/8/10

Name	Affiliation	E-Mail Address
Lawrence (Larry) Bennett	Bennett Engineering / City of Nampa	on file
Tom Dupuis	CITIZEN (TF)	on file
Mike Trabert	City of Twin Falls	on file
Larry Pennington	North Side Canal Co + Idaho Water Users	✓
Lynn Tominaga	IGWA	on file
Barry Burnell	IDEQ	
Doug Conde	AG - DEQ	
Johnna Sandow	DEQ	
Sam Rountree	for Idahoan Foods, LLC	

Boise 7/8/10

Name	Affiliation	E-Mail Address
Steve Cory	citizen	
Carolyn Firth	Idaho Soil and Water Conservation Commission	
DENNIS TANIKUNI	Idaho Farm Bureau	

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 7/8/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
ARA ANDREA	I DL	aandrea@idl.idaho.gov
June Bergquist	IDEQ	

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 7/8/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Lynn Van Every	DEQ - Pocatello	
Claudia Cottle	Bear Lake Watch	

MEETING SIGN-IN SHEET

Meeting Title: NEGOTIATED RULEMAKING

Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 7/21/10 – Boise, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Phone participation:		
Larry Zuckerman	Western Watersheds Project	
Allegra Belnap	Monsanto	
Carolyn Firth	Idaho Soil and Water Conservation Commission	
Justin Hayes	ICL	jhayes@idahoconservation.org
Paula Wilson	DEQ	
Doug Conde	DEQ	
Johnna Sandow	DEQ	
Norm Semanko	Idaho Water Users Association	norm@iwua.org

Boise 7/21/10

Name	Affiliation	E-Mail Address
Larry Pennington	North Side Canal Co + IWUA	
Pat Barclay	ICIE	
Larry Bennett	Bennett Engineering City of Nampa	On file
Lee Van De Bogart	City of Caldwell	
Tom Dupuis	CH2M Hill	
Robbin Finch	Boise City/AIC	
Mark Cecchini Beaver	Idaho AG's Office	
Gary Lemmon		
Linda Lemmon	Idaho Aquaculture Assn.	

Boise 7/21/10

Name	Affiliation	E-Mail Address
Jane Wittmeyer Wittmeyer & Assoc., LLC	Business Interests	janewitt@q.com
Brad Wolfinger	ITD	
Patrick Clark	Oldcastle Materials	
Peter Barton	Givens Pursley	
Hugh O'Riordan	Givens Pursley LLP	
Brent Olmstead	Milk Producers of Idaho	brent@mpidaho.com
Jay LaBeau	Id. Assoc of Commerce & Industry	alabeau@iaci.org
John Tippets	Agrium	

Boise 7/21/10

Name	Affiliation	E-Mail Address
Sarah Higare	Barker Rosholt & Simpson	
Palma Moye	Hecla	
Kevin Beaton	Stoel Rives	
Jack Lyman	IMA	
John Eaton	REALTORS	
Bill Beckwith	EPA	
Don Essig	DEQ	
Mary Anne Kosterman	DEQ	

Boise 7/21/10

Name	Affiliation	E-Mail Address
Barry Burnell	DEQ	on file
Justin Hayes	ICL	
Lynn Tominaga	IGWA	on file
Brenda Tominaga	IRWA	" "
Alan Prouty	J.R. Simplot Co	on file
Liz Paul	Idaho Rivers United	
Jayson Ronk	IACI	

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Meeting Date and Location: 7/21/10 – Coeur d'Alene, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Ara Andrea	Idaho Dept of Lands	aandrea@idl.idaho.gov
June Bergquist	IDEQ	

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Water Quality Standards, Docket No. 58-0102-1001

Meeting Date and Location: 7/21/10 – Pocatello, Idaho

Phone participation: 373-0101/bridge 1

Name	Affiliation	E-Mail Address
Lynn Van Every	IDEQ - Pocatello	lynn.vaneverydeq.idaho.gov
Claudia Cottle	Bear Lake Watch	bearlakewatch@aol.com