



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

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OFFICE OF
WATER AND WATERSHEDS

October 1, 2010

Mr. Barry Burnell
Water Quality Programs Administrator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, Idaho 83706-1255

Re: Proposed Antidegradation Implementation Rule, Docket 58-0102-1001

Dear Mr. Burnell:

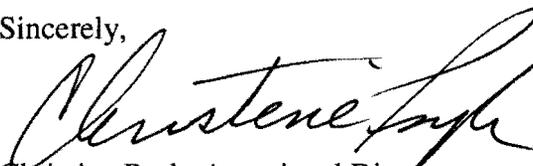
EPA appreciates the Idaho Department of Environmental Quality's (IDEQ) effort to develop antidegradation implementation procedures and this opportunity to provide comments on the proposed rule that was published for public comment on September 1, 2010. We appreciate that the proposed rule addresses a 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.

We look forward to continued work with IDEQ on this issue. If you have any questions, or if we can be of any further support during the remainder of your process, please do not hesitate to contact me at 206-553-1906 or Bill Beckwith, of my staff, at 206-553-2495.

Sincerely,



Christine Psyk, Associated Director
Office of Water and Watersheds

Enclosure

cc: Mr. Michael McIntyre, IDEQ
Mr. Don Essig, IDEQ
Ms. Paula Wilson, IDEQ

October 1, 2010

Enclosure – EPA Comments on IDEQ’s Proposed Antidegradation Implementation Rule,
Docket 58-0102-1001

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 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 (010.067) and it is

unclear if it incorporates the regulatory definition of existing beneficial use (010.326). 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.

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."

► **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.

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 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.

"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.”

► **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 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.”

► **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.

► **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.*"

► **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....

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:"

► **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 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."