October 1, 2010

TRANSMITTAL VIA E-MAIL, FAX, AND U.S. MAIL

Paula J. Wilson
Hearing Coordinator
Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706-1255

RE: Comments on Proposed Rule, Docket No. 58-0102-1001

Dear Ms. Wilson:

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 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".

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)(1)(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

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(208) 769-4100 • FAX (208) 769-7612 • www.hecla-mining.com

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 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.

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 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.

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 clear violation of Idaho Code.

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.

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".

4. EPA-approved antidegradation policy implementation in other states places 303(d)-listed waters to those states' equivalent "Tier I"/§131.12(a)(1) 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.

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.

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 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.

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".

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.

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."

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 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.

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.

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.

- Existing permits have to be excluded as commented in 4) 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 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".

- 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 pre-dating this rulemaking (08.a.iii.).

- 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).

- Paragraph 08.d. speaks of a "measureable change" in a vacuum without the tie to beneficial uses mandated by IC.

- An additional concern is that this subsection, as proposed, appears to be designed exclusively to further restrict or effectively eliminate mixing zones.

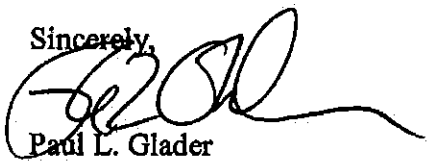
13) Proposed rule language at paragraph 58-0102-1001.052.09.d (page 461 of the 1 September 2010 Idaho Administrative Bulletin) clearly is inappropriate for "existing" discharges in place as of the effective date of the resultant antidegradation implementation rule. There is no rational basis for a need 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.

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 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.

Sincerely,



Paul L. Glader
Manager – Environmental Services