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

9/30/10

RE: Idaho Conservation League comments on Docket No, 58.0102.1001 – Proposed Rule regarding Antidegradation

Dear Mrs. Wilson;

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.

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.

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.

Thank you for your consideration of position on this important matter. Please do not hesitate to contact me at 208-345-6933 ext 24 or at jhayes@idahoconservation.org if you have any questions about comments.

Sincerely,

Justin Hayes
Program Director

cc. Don Essig

**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.

**Tier I Review (052.07.a)**

When determining if the existing beneficial uses are protected during the issuance or re-issuance 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.

**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.

**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.

**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.

**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:

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.

**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.

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.

**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.

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?

**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-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.

**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.

**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.

**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.

Typo: In the second sentence of 350.01.a it reads: "The a real …" This seems to be a typo.

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.

**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.

**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.