



October 1, 2010

Ms. Paula J. Wilson
Hearing Coordinator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706

Submitted via email to: paula.wilson@deq.idaho.gov

Dear Ms. Wilson:

The Northwest Food Processors Association (NWFPFA) offers these comments on the Proposed Rule Docket No. 58.0102-1001- Antidegradation Implementation Procedures.

NWFPFA 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. NWFPFA 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 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

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.

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

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 NWFPA recommendation is consistent with an approach taken by other states.

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.

I.B. Special Resource Waters

The proposed rule does not address Special Resource Waters (SRW). NWFPFA recommends that each SRW be evaluated and managed for antidegradation purposes the same as any other water segment in Idaho.

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 a 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. NWFPFA recommends that DEQ maintain a list of Tier I and II waters.

I.D. Recommendations

Specific language changes recommended (underline – new language; strikethrough-deleted language):

01.49 Impairment (delete entire definition)

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.

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 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.~~

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.

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 ten percent (10%).~~

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?

Instead, NWFPA suggests that DEQ adopt language similar to that which is found in the Colorado rule (see Attachment 1). 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.

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.

Sincerely,

Craig Smith
Vice President

If a determination has been made in accordance with section 31.8(3)(c) that a proposed regulated activity is likely to result in significant degradation of reviewable waters, a determination shall be made pursuant to this section whether the degradation is necessary to accommodate important economic or social development in the area in which the waters are located. The following provisions shall apply to this determination:

- (i) The "area in which the waters are located" shall be determined from the facts on a case-by-case basis. The area shall include all areas directly impacted by the proposed regulated activity.
- (ii) A determination shall be made from the facts on a case-by-case basis whether the proposed regulated activity is important economic or social development. If the activity proponent submits evidence that the regulated activity is important development, it shall be presumed important unless information to the contrary is submitted in the public review process. The determination shall take into account information received during the public comment period and shall give substantial weight to any applicable determinations by local governments or land use planning authorities.
- (iii) If the proposed regulated activity is determined to be important economic or social development, a determination shall be made whether the degradation that would result from such regulated activity is necessary to accommodate that development. 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 waters and (B) are determined to be economically, environmentally, and technologically reasonable.

This determination shall be based on an assessment of whether such alternatives are available, based upon a reasonable level of analysis by the project proponent, consistent with accepted engineering practice, and any information submitted by the public or which is otherwise available. The assessment shall 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. Any alternatives that would be inconsistent with section 25-8-104 of the Water Quality Control Act shall not be considered available alternatives.

In determining the economic reasonableness of any less-degrading water quality control alternatives, the Division may take into consideration any relevant factors, including but not limited to the following, if applicable:

- (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 POTWs or public water supply projects;
- (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 conservation alternatives.

(e) Public Participation and Intergovernmental Coordination

Procedural provisions relating to public participation and intergovernmental coordination and antidegradation reviews are set forth in the Procedural Rules, Regulation No. 21, section 21.16 (5 CCR 1002-21).

(f) Public Nomination-Water Quality Based Designations

Any person may nominate any state water for designation as outstanding waters or use-protected during triennial review or at any time. Such nomination shall include written documentation of the qualifications for such designation based upon the criteria in section 31.8(2)(a) or (b).

(g) Protection of Existing Uses

If, during an antidegradation review, it is determined that an existing use of the affected waterbody has not been classified, prior to completing the antidegradation review for an applicable regulated activity, an expeditious rulemaking hearing shall be held (on an emergency basis if necessary) to consider adoption of the additional classification.

31.9 FLOW CONSIDERATIONS

(1) Low Flow Exceptions

Water quality standards shall apply at all times; provided, that in developing effluent limitations or other requirements for discharge permits, the Division shall normally define critical flow conditions using the following low-flow values: the empirically based 30-day average low flow with an average 1-in-3 year recurrence interval (30E3) for chronic standards, (except for temperature limitations, which use the empirically based 7-day average low flow with an average 1-in-3 year recurrence interval (7E3)), and the empirically based 1-day low flow with an average 1-in-3 year recurrence interval (1E3) for acute standards, or the equivalent statistically-based flow. The period of record for determining low flows shall be based on a minimum of ten years of flow data, except that, when ten years of data is not available, low flows may be determined, on a case-by-case basis, using a period of record of less than ten years. If more than ten years of flow data is available, it may be more appropriate to establish low flow conditions based on a longer period of record to more accurately reflect site specific conditions. For streams with seasonal rapidly rising or falling hydrographs, the Division shall use, if so requested by a discharger, the procedure set forth in subparagraphs (a) through (e) below for calculating 30E3 values for those transitional flow periods of the year. For certain substances such as ammonia, the low flow exceptions may be based on periodic or seasonal flows as determined on a case-by-case basis by the Division.

- (a) Averaging Procedure – Calculation of 30-day Forward Moving Harmonic Means - Moving harmonic means shall first be calculated for each consecutive thirty-day period in the period of record being considered.
- (b) Calculate Annual 30E3 Value - Determine the annual 30E3 value using the procedure set forth in Appendix A using (i) 30-day forward moving harmonic means, and (ii) the excursion procedure for a 1-in-3 year recurrence interval.
- (c) Assigning Harmonic Means - Each 30-day harmonic mean shall then be assigned to a month. A harmonic mean shall be assigned to a specific month only if the harmonic mean is calculated using data for 15 or more days from that month.