



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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OFFICE OF  
WATER AND WATERSHEDS

May 5, 2010

Paula Wilson  
Administrative Rules Coordinator  
Department of Environmental Quality  
1410 N. Hilton  
Boise, Idaho 83706

RE: Preliminary Draft Antidegradation Rule No. 1, Docket 58-0102-1001

Dear Ms Wilson:

EPA appreciates the Idaho Department of Environmental Quality's (IDEQ) effort to develop antidegradation implementation procedures and provides the following comments on preliminary draft number 1.

1) Section 03, Emergency Actions, page 1: We suggest that this provision be deleted, and that emergency actions and their impacts with regard to any degradation of water quality be addressed through enforcement discretion. That is a more appropriate mechanism for determining if a specific situation warrants consideration as an emergency.

2) Section 04.b, Initiation of Antidegradation Review, page 1: We suggest the following deletion, "Review of degradation potential and application of the appropriate level of protection from degradation will be triggered by an application for a new or reissued permit or license ~~for a discharge.~~"

We suggest deletion of "for a discharge" to avoid any question as to whether the rule covers all activities to which antidegradation provisions should apply. The definition of "permit or license" on page 8 of the preliminary draft rule covers the activities to which antidegradation provisions should at a minimum be applicable, including activities subject to federally issued permits or licenses and state certification under section 401 of the CWA (such as NPDES permits, dredge and fill permits, and FERC licenses). However, the definition of "discharge" in Idaho's water quality standards (58.01.02.010.23) follows the NPDES definition at 40 CFR Part 122 and is specific to a discharge of pollutants. A State's certification of a FERC relicensing, for example, may address discharge in the broader sense under section 401 of the CWA.

3) Section 04.c, Parameter by Parameter Approach, page 2: EPA supports IDEQ's proposed parameter by parameter approach as an appropriate means to provide comprehensive protection of "high quality water" consistent with 40 CFR 131.12(a)(2).

4) Section 04.d, Evaluation of effect of discharge on water quality, page 2: The requirements for measured discharge quality, such as the requirement for three years of discharge monitoring data (for existing discharges at 04.d and current discharge quality at 04.d.ii.1) and the provision that

“No evaluation will be made of parameters for which there are not monitoring data” (04.d.ii.1), do not provide for evaluation of cases where there is a proposed discharge of a new parameter, or a proposed increase in discharge of a parameter that has not been monitored. Clarification is necessary to ensure that such proposed new or increased discharges are addressed.

We would generally expect “future discharge quality” to be levels proposed by the applicant, and existing discharge quality might require monitoring specifically for the antidegradation review.

5) Section 04.d.i, Effect on water quality, page 2: We suggest the following change to the first sentence of 04.d.i, “...after ~~full~~ *considering any appropriate allowance for* mixing of the discharge and the receiving stream under critical conditions *as provided for in IDAPA 58.01.02.060.*”

Use of “full mixing” of the discharge with the receiving water should only be considered where such mixing is determined to occur within an acceptable distance/area and time from the point of discharge. The point of full or complete mixing may not occur until many miles downstream from the point of discharge, and far downstream of an appropriately sized regulatory mixing zone. Generally any mixing allowance used for antidegradation analysis should be the same as would be used in the evaluation of permit limits for the discharge.

The same comment stands for the proposed new definition of “degradation” on page 8 of the preliminary draft rule.

6) Section 04.d.ii.3, Discharge quality, page 2: We seek clarification as to the meaning of this provision.

7) Section 04.d.iii, Receiving Stream Quality, page 2: “measured” should be replaced with “*measured or modeled as appropriate.*”

Procedures for determining existing water quality and whether water is high quality for a given parameter should recognize the potential need for modeling as well as ambient measurements to accurately characterize water quality and assimilative capacity available for new or increased sources.

8) Section 04.d.v, Measureable change, page 2: This provision should be revised so that a proposal to increase the discharge of a chemical like dioxin, that is toxic in concentrations that are below analytical detection limits and may not be measurable in a facility’s effluent, is not exempted from an antidegradation review.

EPA is still reviewing the proposed definition of “measurable,” and the use of “measurable” in the definition of “degradation.”

9) Section 04.e, Tier I Review, page 2: 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 ensure the water quality necessary to protect existing uses in all cases.

We recognize that Idaho's current water quality standards have separate definitions for "beneficial use" and "designated beneficial use" (58.01.02.010.06 and 20), and IDEQ may have used "beneficial use" in the draft rule at section 04.e with the intent of addressing both designated uses and existing uses that are not designated. Nevertheless, Idaho's water quality standards also have an explicit regulatory definition of "existing use" (Existing Beneficial Use or Existing Use at 58.01.02.010.32), consistent with the federal definition at 40 CFR 131.3(e), that is not clearly reflected in Idaho's beneficial use definition.

To ensure clarity on this issue, we suggest the following revisions:

Revise 04.e to read, "...thus no degradation of water quality may be allowed that would cause or contribute to violation of water quality criteria or to the loss of any better water quality that may be necessary to maintain and protect existing uses."

Revise 04.e.i to read, "...the Department shall ensure that the discharge authorized by a new or reissued license or permit meets criteria adopted to protect and maintain designated beneficial uses, provides for any better water quality that may be necessary to maintain and protect existing uses, and shall ensure that the discharge complies with the provisions of section 054 of these rules.

Revise 04.e.ii to read, "...no change in existing discharge or no new discharge may be allowed that would degrade ambient water quality below criteria established to protect designated beneficial uses or below any better water quality that may be necessary to maintain and protect existing uses."

10) Section 04.f, Tier II Analysis, page 3: To further clarify that existing use protection applies when implementing Tier II, consistent with 40 CFR 131.12(a)(2), we suggest addition of the following sentence to the introductory section, "In no case shall the Department allow degradation of water quality below that necessary to protect existing uses."

11) Section 04.f.i, Tier II, Public Involvement, page 3: EPA will review the intergovernmental coordination and public participation provisions of IDEQ's Continuing Planning Process, and provide any comments that may be appropriate in the context of antidegradation procedures.

12) Section 04.f.iii, Insignificant Discharge, page 3: EPA supports the proposal for a cumulative cap on any allowance for degradation that does not require a full Tier II antidegradation review (f.iii.1.a), and the proposal that any determination of insignificance will be subject to public participation (f.iii.2).

As you are aware, insignificant or de minimis degradation has been a subject of litigation. At this time EPA believes it will likely accept a cumulative de minimus value up to 10% of the remaining assimilative capacity of the receiving water for a given parameter (f.iii.1.a). We expect that IDEQ will set the date for tracking cumulative degradation at the effective date of the adopted antidegradation rule, or an earlier date.

13) Section 04. f.iii.1.a, Insignificant Discharge, page 3: The provision at section f.iii.1.a should be expressed in terms of remaining assimilative capacity, “In no case will the Department determine insignificance when: The discharge will ~~change ambient concentration by~~ use remaining assimilative capacity of ...”

14) Section 04.f.iv, Alternatives Analysis, page 3: Alternatives analysis is important in the determination of whether it is necessary to lower water. To further promote alternatives analysis as forethought in project design, we suggest revising 04.f.iv.1 as follows, “Controls to minimize degradation should be considered at the ~~earliest possible stage of~~ initiation of project design.”

15) Section 04.f.iv.4.c, Alternatives Analysis, page 4: We suggest the following wording for 04.f.iv.4.c, “Select the least degrading option that is feasible ~~or show that a more degrading alternative is socially and economically justified~~ while still accommodating important economic or social development that may be associated with the project.”

Our concern is that in the context of the Tier II antidegradation review, if the most degrading alternative is associated with important economic or social development, then that alternative might be considered “socially and economically justified.” However, the goal of the Tier II alternatives analysis is to identify alternatives that would eliminate, or minimize if elimination is not feasible, degradation associated with projects that would provide important economic or social development. We believe IDEQ’s intent is to eliminate or minimize degradation, and we would be happy to discuss the language in the preliminary draft rule.

16) Section 04.g, Tier II1/2 – Special Resource Waters (SRW), page 4: Some states have found the concept of a Tier II1/2 provision to be a useful way to provide a high level of protection for waters, without committing to the full Outstanding National Resource Water level of protection that is consistent with the federal regulation. We note that Idaho has a process for nomination of ORW’s, and suggest that IDEQ consider developing such a process for its SRW provision as well.

17) Section 04.g.iii.1, Restrictions of point source discharges to SRWs and their tributaries, page 5: We seek clarification that lowering of water quality, if authorized in a SWR, is done consistent with provisions at least as stringent as those appropriate for Tier II.

18) Section 04.g.iii.2, Restrictions of point source discharges to SRWs and their tributaries, page 5: We would like to discuss this provision with IDEQ.

19) Section 04.h.vi.1, Restriction of nonpoint source activities on ORWs, page 6: We would like to discuss this provision with IDEQ.

20) Section 04.h.vii, Restriction of point source discharges to ORWs and their tributaries, page 6: To ensure consistency with the federal provision for ONRWs at 40 CFR 131.12(a)(3), explicit language addressing the need to maintain and protect water quality should be added as follows, “New or increased point source discharges to ORWs may be allowed only if they are offset by reductions in other discharges per subsection 051.04.d.iv that will ensure that the water quality of the ORW is maintained and protected.”

21) Proposed New Definition of “Degradation,” page 8: We suggest the following revisions to the proposed definition of “degradation” to address the concerns discussed below, “For purposes of antidegradation review, degradation means a ~~change in~~ lowering of water quality that is measurable ~~and adverse to beneficial uses that may be made of the water~~, as calculated ~~upon full~~ considering any appropriate allowance for mixing of the discharge and receiving water under critical conditions *as provided for in IDAPA 58.01.02.060.*”

To ensure consistency with the federal antidegradation provisions at 40 CFR 131.12, it is important that the definition of degradation does not imply that uses must be adversely affected before a proposed change in water quality triggers an antidegradation review. EPA understands that “adverse” as used in the definition of “degradation” is simply intended by IDEQ to mean that degradation has an adverse effect, as opposed to a beneficial effect. Nevertheless, we believe the definition should be clarified. One suggestion is to refer to a lowering of water quality consistent with the federal regulation as shown above. If IDEQ is concerned that there will be confusion between, for example, lower water quality for toxic chemicals which implies an increase in concentration and lower water quality for dissolved oxygen which implies a decrease in concentration, this could be explained in the definition.

EPA is also concerned with presumptive use of “full mixing.” As expressed in an earlier comment, “full mixing” of the discharge with the receiving water should only be considered where it is determined to occur within an acceptable distance/area and time from the point of discharge.

22) Proposed New Definition of “Measurable,” page 8: EPA is still reviewing the proposed definition of “measurable,” and the use of “measurable” in the definition of “degradation” and elsewhere in the preliminary draft rule.

We look forward to continued work with IDEQ on this issue. Please contact me if you have any questions, 206-553-2495.

Sincerely,



William R. Beckwith  
Water Quality Standards Coordinator

cc: Barry Burnell, IDEQ  
Don Essig, IDEQ

(by email)