



Idaho Dairy Farmers' Association, Inc.

1182 Eastland Drive North, Suite A
Twin Falls, ID 83301

Phone: (208) 733-6372
Fax: (208) 735-5955

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DEQ Hearings Coordinator
DOCKET NO. _____

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

Re: Draft Antidegradation Negotiated Rule
Docket No. 58-0120-1001

Dear Paula:

The Idaho Dairy Farmers' Association (IDA) supports the comments of the Idaho Association of Commerce and Industry ("IACI"). IDA has followed the various draft negotiated rules.

CWA DOES NOT REGULATE WATERS OF STATE

IDA supports the language submitted by IACI to Rule Draft No. 2 stating: "Idaho's Antidegradation Policy only applies to navigable waters subject to jurisdiction of the Clean Water Act." This language apparently was not accepted by IDEQ. Draft Numbers 5 and 6 refer to "waters of the state." The Idaho legislature authorized IDEQ to adopt antidegradation requirements beyond the minimum requirement of the CWA.

The 1995 Idaho Water Act at I.C. 39-3601 declared the policy of the legislature as follows:

The director, in cooperation with such other agencies as may be appropriate, shall administer this chapter. 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. (Emphasis added).

In 2005, the Idaho legislature again expressed its intent that IDEQ not exceed federal requirements. I.C. 39-175B stated relationship between state and federal law as follows:

However, any state permitting program must avoid the existence of duplicative, overlapping or conflicting state

and federal regulatory systems. Further, the board may promulgate rules to implement a state permitting program but such rules shall not impose conditions or requirements more stringent or broader in scope than the clean water act and regulations adopted pursuant thereto. Further, the department will not require NPDES permits for activities and sources not required to have permits by the United States environmental protection agency. (Emphasis added).

As written, definitions in Rule Draft No. 5 at p. 9 and Draft No. 6 at p. 10, is unacceptable as it proposes to apply anti-degradation rules to “waters of the state.” The rule text must expressly limit IDEQ’s authority to waters of the United States.

REGULATING WATERS OF STATE WILL BE COMPLEX

The definition of “waters of the state” is confusing. The Environmental Health and Protection Act (EHPA) I.C. 39-103(16) defines waters (not waters of the “state”) as:

. . . all accumulations of water, surface and underground, natural and artificial, public and private or parts thereof which are wholly or partially within, flow through or border upon this state except for private waters as defined in section 42-212, Idaho Code.

This is an extremely broad definition encompassing a wide variety of activities in Idaho. For example, under this definition, statutory exclusions from the National Pollution Discharge Eliminate System (NPDES) permits such as non-point source agricultural or silvacultural activities including agricultural storm water discharges are allowed from facilities which have a general or specific NPDES permit would arguably be regulated.

I.C. 39-3602 definition 28 “Waters or Water Body” is defined as:

“. . . as all the accumulations of surface water, natural and artificial, public and private, or parts thereof which are wholly or partially within, flow through or border upon this state. For the purposes of this chapter, water bodies shall not include municipal or industrial wastewater treatment or storage structures or private reservoirs, the operation of which has no effect on waters of the state” (emphasis added).”

IDEQ’s proposal to expand antidegradation regulations to include “water of the state” exceeds the CWA and will create confusion. Any antidegradation rule should be expressly limited to waters of the United States as required by the CWA.”

PROPOSED REGULATION OF NONPOINT SOURCES IS CONFUSING

The Negotiated Rule Draft Nos. 5 and 6 is an unusually complicated regulation. The "Idaho Antidegradation Implementation Discussion Paper, Point and Nonpoint Source Controls" suggests nonpoint source controls ("NPS") by discussing broad upstream review of nonpoint activities and best management practices ("BMPs"). The Clear Water Act ("CWA") 33 U.S.C. Section 1251 *et seq.* and the Environmental Protection Agency ("EPA") implementing regulation for anti-degradation do not mandate BMPs for nonpoint sources beyond those current in Idaho law and do not require IDEQ to ensure that all reasonable and cost-effective BMPs are being achieved by NPS in the area of concern." White Paper, p. 5.

IDEQ seems to be proposing BMPs for NPS, while the federal antidegradation regulations do not require such BMPs. The IDEQ white paper suggests that "guidance" be developed to establish procedures to determine where the BMPs are being implemented satisfactorily. IDA opposes regulatory authorization of "guidance" for NPS activities. Agricultural storm water runoff or irrigated agricultural return flows are not subject to antidegradation regulations and are outside NPDES permitting requirements.

IDEQ also proposes that antidegradation regulation apply to "waters of the state." The CWA regulations do not apply to "waters of state" but only to "navigable waters" of the United States.

TIER II ANALYSIS NOT COMMON

IDA was surprised by IDEQ's statement during the July 7, 2010 rulemaking meeting, that only two Tier II analyses have been completed in other states. Given that IDEQ does not have adequate biological data to conduct Tier II analysis, IDA is concerned that the regulations, as proposed, will not work.

CONCLUSION

IDA believes that Negotiated Rule Draft Nos. 5 and 6 exceed federally required antidegradation regulations and seeks to improperly regulate NPS. A simpler rule limited to federal requirements should be developed. IDA cannot support antidegradation regulation of NPS or of "water of the state" or "waters" as defined by EHPA. IDA does not support broad regulation of NPS activities which exceed CWA requirements.

IDA stands ready to continue negotiations with IDEQ. Thank you for your attention.

Bob Naerebout



Executive Director
Idaho Dairymen's Association.