July 7, 2010

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

Re: Draft Anti-degradation Negotiated Rule
Docket No. 58-0102-1001

Dear Paula:

The Idaho Association of Commerce & Industry ("IACI") remains concerned with many of the provisions of the latest draft rule. A number of key issues that need to be resolved follow:

1. IDENTIFICATION OF TIER I AND II WATERS. We appreciate IDEQ's decision to identify high quality waters based on the waterbody approach. However, IACI had proposed a straight-forward manner to address § 303(3) listed waters. Namely, that all § 303(d) waters would not be considered high quality water. This approach has been approved by EPA in other states and upheld by a Federal Court of Appeals as consistent with the Clean Water Act.

The latest IDEQ proposal does not follow this approach but instead has proposed a number of "exceptions" – which are problematic. First, the latest draft elevates "biological data," including the presence/no presence of such data, to be the arbitrator as to whether or not a water body is classified as Tier I or Tier II. IACI is not aware of any regulatory or technical reason to solely use biological data as the determining factor for anti-degradation classifications. Second, the latest draft has a new definition for "impairment," which apparently means that waters can be "impaired" for § 303(d) listing but are not "impaired" for purposes of identifying them as high quality waters. IACI does not believe that a special definition of "impairment" is needed. Further, the draft presumes that waters that have not been assessed in the Integrated Report should be presumed to be Tier II waters. This approach may be overly protective and will consequently add significant costs to regulated entities seeking permits on such waters. Finally, we continue to believe that Special Resource Waters (SRWs) should be Tier II waters unless they are 303d listed, in which case they should be treated as Tier I waters.

IACI is concerned with the complexity of the approach in the latest DEQ draft and requests again that IACI's streamlined proposal be followed.

2. SCOPE OF WATERS COVERED. The current draft proposes to apply the rule to "waters of the state." This is not necessary to meet the requirements of the Clean Water Act. We reiterate our position that this rule should apply only to "waters of the United States." We seriously doubt the Idaho Legislature intended to expand the scope of anti-degradation

requirements beyond the requirements of the Clean Water Act, particularly in light of the declaration of policy found at Idaho Code § 39-3601. However, if IDEQ believes that the Legislature had directed IDEQ to apply anti-degradation to all waters of the state, we would propose amending the statute at the next legislative session to address this issue and other necessary statutory revisions which have been brought up in the subject rulemaking. In the meantime, the rule should only address "waters of the United States."

3. SCOPE OF PERMITS COVERED. The draft proposes to apply the rule to permits, licenses and other IDEQ regulatory activities. Again, this is not necessary to meet the requirements of the Clean Water Act. We recommend that the application of the rule be limited to those federal permits required under the Clean Water Act such as NPDES and 404 permits.

4. EXEMPTION OF INSIGNIFICANT DISCHARGES. As stated in earlier comments by IACI, 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 anti-degradation. The proposed value of ten percent (10%) for determining "insignificance" is appropriate; however, we believe the rule should only apply one methodology in determining insignificance. Assimilative capacity has been a methodology approved by EPA in other jurisdictions, and therefore the rule should only specify a 10% assimilative capacity threshold as suggested in earlier IACI comments.

Further, even if a discharge is considered insignificant, the proposed language by DEQ essentially requires a "modified-Tier II" analysis for such discharges. The question of whether or not a discharge is insignificant is a technical question, rather than one of "assuring that other controls are in place" or providing for another layer of public comment. IACI recommends that the rule in regards to determining what is insignificant should be limited to providing numerical values for determining whether or not a discharge is insignificant, and then provide DEQ the ability to consider that information along with the size and character of a discharge or the magnitude of its effect on the receiving stream and determine whether it is insignificant or not. This information and decision is subsequently available for public review during DEQ's 401 certification process. Thus, DEQ will explain to the public why a decision was made to determine that a discharge is "insignificant" and the public will have the opportunity to comment and provide information on that decision.

5. GENERAL PERMITS. The draft does not adequately address the issue of general permits. This is an important issue that will have a significant impact on a large portion of the regulated community. IACI has proposed a regulatory presumption that general permits satisfy anti-degradation. (This of course could be rebutted depending upon the general permit and the location of discharge.) Provisions related to general permits, properly drafted, could ease the burden on the regulated community while protecting the state's interest in protecting water quality.

6. CONDUCTING A TIER II ANALYSIS. IACI, in its proposed revisions to the rule provided to DEQ in June, provided specific language on the Tier II Analysis process. IACI still has a number of concerns with the latest language in this portion of the rule. One significant

concern is that the proposed language still requires the applicant to identify and verify that all point and non-point sources have the "the highest statutory and regulatory requirements" (point sources) or "cost-effective and reasonable best management practices for nonpoint source controls" (non-point sources). Applicants do not have the information that would be needed to make such a determination. That information is more appropriately gathered and analyzed by DEQ.

SUMMARY

IACI, in previous correspondence to DEQ, identified a number of issues with this rulemaking. Those comments were developed with an eye towards protecting water quality, meeting all requirements of the Clean Water Act and avoiding unnecessary, expensive and redundant requirements on the regulated community. All of our proposed approaches are drawn from anti-degradation programs of other states that have either been approved by EPA or by federal courts in the settlement of litigation challenging state programs. Through the negotiated rulemaking process, some of these issues have been addressed; however, as noted above, we still believe that significant work remains. We look forward to further discussions with DEQ on these matters.

Sincerely,

Alex LaBeau
President