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July 27, 2010

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

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

Dear Paula:

The Boise Project Board of Control ("Board of Control" or "BOC") generally agrees with the comments submitted by the Idaho Association of Commerce and Industry ("IACI"). BOC has followed the various draft negotiated rules and submits the following comments on Idaho Department of Environmental Quality's ("DEQ") draft 6 of the Antidegradation Implementation Procedures.

Appropriate Trigger for Antidegradation Review

The Board of Control suggests that clarifying the circumstances for triggering antidegradation review to discharges to waters of the United States is necessary and clarifying that only applications covered by the State's 401 certification obligation would require possible antidegradation review is necessary. The Board of Control believes that clarifying the rule in this manner is consistent with DEQ's intent.

The Implementation section, 052 of Draft 6, provides:

01. List of waters protected. All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a waterbody by waterbody approach during the antidegradation review. The Department will not maintain a list of Tier I or II waters. Waters given SRW protection are designated in rule, and waters given Tier III protection are designated in law.

02. Initiation of Antidegradation Review. 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.

Negotiated Rule Draft 6, Pg. 2.

BOC recommends changes to that section as follows:

01. List of waters protected. This rule applies to waters of the United States. All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a waterbody by waterbody approach during the antidegradation review. The Department will not maintain a list of Tier I or II waters. Waters given SRW protection are designated in rule, and waters given Tier III protection are designated in law.

02. Initiation of Antidegradation Review. 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 that is subject to certification by the State under Section 401 of the Clean Water Act for discharges of pollutants to waters of the United States.

This change to the implementation section removes ambiguity from the scope of the rule in the existing language.

Additionally, the Draft Rule has references to waters of the state, for example in the section on Special Resource Waters, the rule provides:

Waters of the state may be designated as SRWs.

and

Those waters of the state designated as SRWs are listed in sections 110 through 160.

Negotiated Rule Draft 6, Pp. 8-9. DEQ should not include the language "waters of the state" in a rule that implements federal legislation.

The Idaho Legislature has directed:

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.

I.C. 39-3601 (emphasis added), and:

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.

I.C. 39-1 75B (emphasis added).

Applying antidegradation rules to “waters of the state” contravenes the Idaho Code. In the interest of clarity and consistency, the Board of Control supports the language proposed by IACI as follows:

Idaho’s antidegradation policy only applies to navigable waters subject to the jurisdiction of the Clean Water Act.

IACI Comment on Draft 2, Pg. 1.

Impaired Waterbodies

The Board of Control objects to including waterbodies defined as “impaired” under Section 303(d) as Tier II waters. Waterbodies on the 303(d) list should be treated as Tier I waterbodies for this rule. It is inconsistent for DEQ to determine that a waterbody is “impaired” for 303(d) purposes and not “impaired” for this rule. If a waterbody is not impaired, it should be removed from the 303(d) list.

Discharges from Canal Drop Hydroelectric Facilities

The Board of Control also requests that DEQ expressly recognize that discharges from hydroelectric facilities that occur entirely within an existing canal system do not require antidegradation review. The canals of the irrigation systems in this state provide the potential for a large number of small, lowhead hydroelectric facilities. Many of these would be new or renewed projects requiring FERC approval, which might trigger 401 certification and antidegradation review under the language of this proposed rule. The water is already turned into the canals for irrigation purposes, it is delivered to farm land and other users for irrigation purposes. As the water passes through the canal systems there are locations where there is sufficient flow and fall to generate electricity at a small hydroelectric plant. The “discharge” from the plant is back to the canal system, where the water continues on for irrigation uses. The canals are not waters of the United States and the discharge has no effect on the ability of the water to be used for irrigation purposes. These small projects are often marginally economical to build and operate. If a canal drop project has to go through a time consuming and expensive antidegradation review, many otherwise beneficial projects would not be built. These canal drop projects produce carbon-free environmentally electricity and should be encouraged, not discouraged with additional regulatory hurdles. Canal drop projects should be categorically exempt from antidegradation review.

The following language would be appropriate:

Canal drop hydroelectric projects where the discharge from the hydroelectric facility is entirely back to a canal shall not require antidegradation review under this rule.

General Permits

DEQ has proposed the following language regarding general permits:

The Department will conduct antidegradation review, including a Tier II analysis, for general permits at the time at which general permits are certified. The Department may conclude all activities covered under a general permit do not require individual antidegradation review where there is reasonable factual basis to support such a conclusion. The Department may also conclude that some or all of the activities covered under a general permit require the submittal of additional information at the time a Notice of Intent for coverage is submitted and/or warrant individual antidegradation review.

Draft 6 Revision, Pg. 1, Section 051.07 (emphasis added).

The Board of Control believes that antidegradation review should not be triggered by an individual Notice of Intent under a general permit, as the individual Notice of Intent does not trigger the need for 401 certification. The "may conclude" language in this section is vague and provides no practical guidance. In addition, where the general permit is authorizing existing uses to be continued, under more stringent controls, such as in the proposed Pesticide General Permit for Point Source Discharges to Waters of the United States from the Application of Pesticides, the Board of Control believes that antidegradation review should not be triggered, as this permit involves no degradation (as in the case of a renewal of an existing permit with the same or more stringent requirements). Therefore, the Board of Control supports IACI's recommendation that new or expanded discharges covered by general permit not be subject to further antidegradation review as follows:

The Department will presume that new or expanded discharges that will be covered by a general NPDES Permit issued by EPA or a nationwide permit issued by the United States Army Corps of Engineers shall be insignificant.

IACI Comment on Draft 2, Pg. 4.

In addition, the DEQ should expressly recognize that:

General permits which authorize existing actions or operations under the same or more stringent criteria for discharges shall not trigger antidegradation review.

Paula J. Wilson
July 27, 2010
Page 5

Thank you for the opportunity to submit these comments on the draft Antidegradation Implementation Procedures.

Very truly yours,

BARKER ROSHOLT & SIMPSON LLP

A handwritten signature in black ink, appearing to read 'Albert Barker', written in a cursive style.

Albert Barker

APB/se