July 27, 2010

TRANSMITTAL VIA E-MAIL, FAX, AND U.S. MAIL

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

RE: Comments on Preliminary Draft Rule, Draft #6 and Revision, Docket No. 58-0102-1001

Dear Ms. Wilson:

As an introductory comment, we reiterate our written comment of 28 April 2010:

> "Hecla takes exception to the allegation that the state of Idaho does not implement the state's antidegradation policy merely because there is no formal written document outlining the approach. Both the water quality-based permitting approach, coupled with biological assessment/opinions where required by federal law, fully protects the beneficial uses of Idaho's waters. We are not aware of any situation in Idaho where the technical lack of a written implementation approach for the antidegradation policy has jeopardized any beneficial uses anywhere in the state."

Hecla appreciates the opportunity to comment on the preliminary draft rule #6 and revision.

1) Although Hecla has maintained a presence in this ongoing "negotiated rulemaking" process, it has been very difficult to follow. We are sure it has been difficult for the Department of Environmental Quality (DEQ) to document the ongoing draft rule status while attempting to assure the public is able to track exactly what is proposed to be changed in the existing rules at IDAPA 58.01.02-. However, regardless of the difficulty to DEQ, we are not aware of any exemption for "negotiated rulemaking" from the legislative format for draft rules presented to the public for comment. There is something fundamentally wrong in a "negotiated rulemaking" process when proposed changes to existing rules are not explicitly clear by a direct reading. The "**Note:**" to draft #6 states "**The following is largely proposed new rule language**", which is of little to no use to the reviewing public when the change of a single word can change the meaning of existing rules. We expect that the final draft rule submitted for publishing in the Idaho Administrative Bulletin will strictly adhere to the legislative format.

2) The sole purpose of this "negotiated rulemaking" is to **implement** Idaho's existing antidegradation policy, as stated in the past "DESCRIPTIVE SUMMARY" in the Idaho

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Administrative Bulletin. Hecla submitted written comments on 28 April 2010 in addition to comments made verbally during past "negotiated rulemaking" meetings. It is not clear how or if past Hecla comments were considered or rejected as subsequent draft rules were developed by DEQ. Accordingly, Hecla comments of 28 April 2010 are incorporated into these comments by reference as an ongoing matter of material concern.

3) Hecla supports strict limitation of the implementation of the antidegradation policy, as mandated by Idaho Code (IC) 39-3601, solely to navigable waters subject to jurisdiction of the Federal Water Pollution Control Act (U.S.C. § 1251 et se.). All rule references under antidegradation implementation relating in any way to "waters of the State" must be deleted and language inserted into the implementation section that clearly limits application of the antidegradation policy to "navigable waters of the United States".

4) The current Idaho rules capture the antidegradation policy in a separate rule main Section number, and this format should be maintained. Revised draft #6 should move items "04.", "05", "06.", and "07.", which are implementation items, to main Section number "052." – the antidegradation "**IMPLEMENTATION**" main Section. Further, an introductory note to Section 052. is necessary. This introductory note must clearly state that the implementation of the Section 051. antidegradation policy "shall be consistent" with the law at IC 39-3603. The verbatim law directive must also be inserted into the Section 052. introduction to assure the law directs the rules and that the rules do not circumvent the intent of the authorizing law. The state's antidegradation policy is clearly set out in IC as follows:

> **39-3603. GENERAL WATER QUALITY STANDARD AND ANTIDEGRADATION POLICY.**
>
> The existing instream beneficial uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected. Where the quality of waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained unless the department finds, after full satisfaction of the intergovernmental coordination and public participation provisions of this chapter, and the department's planning processes, along with appropriate planning processes of other agencies, that lowering water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such reductions in water quality, the department shall assure water quality adequate to protect existing uses fully.

The law is clear that beneficial uses drive the process and not detectable / measureable changes in water quality.

5) In addition to moving proposed "05. Restoration Projects" from main Section number 051. to 052., this exemption to antidegradation review should clearly state that activities either taken under superfund or within superfund sites, where water quality is a consideration influencing the superfund activities, are exempt from antidegradation review. This may seem intuitively obvious due to the extraordinary level of effort associated with such activities. Further, activities subjected to federal biological assessments or biological opinions should be clearly exempted.

6) In addition to moving proposed "07. General Permits" from main Section number 051. to 052., this exemption to antidegradation review should clearly state that general permits are exempt from antidegradation review. We are not aware of any law, either federal or state, which mandates the addition of either conditions or layers of review onto general permits. This essentially obviates the benefits of general permits. Besides, an individual permit can be issued in any specific situation where a general permit has proved to be inappropriate, without subjecting the entirety of the general permit process to antidegradation review. We further understand that such an exemption for general permits has been EPA-approved in other states. EPA's Multi-Sector General Permit for Stormwater Discharges Associated With Industrial Activity (MSGP), for example, has a two decade history of detailed technical support, all part of an exhaustive public record, including antidegradation provisions. We are unaware of any general permits developed without valid technical support.

Aside from the fact that we are unaware of ANY situations in Idaho where compliance with a general permit has failed to protect designated beneficial uses, conditions more stringent than required under the Clean Water Act violates IC. IC 39-3601 clearly states:

> 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.

7) Proposed 052.02 cannot include "reissued permit or license" because other states have EPA-approved antidegradation implementation plans that exempt reissued permits and licenses. Again, IC prohibits rules containing requirements beyond those of the CWA. If the intent is to include only those reissued permits or licenses requesting less stringent effluent limitations, the rule should clearly specify these situations as being potentially subject to antidegradation review (if insignificance does not apply).

8) It is disappointing that proposed 052.03., in "Identification of Tier I and Tier II Waters", fails to mention the state's EPA-approved 303(d) list specifically, instead choosing to invoke the entirety of the Integrated Report, which may contain conflicting information between report sections. The fact remains that a waterbody listed as "impaired" on the Idaho 303(d) list cannot be considered "high quality", thus deserving of Tier II status. Again, placing 303(d) list waters in Tier I has been EPA-approved in other states, and to do otherwise in Idaho rules violates IC. We are unaware of any CWA provision allowing different states to be treated more stringently than others under the CWA, unless of course the state chooses such an approach, which the Idaho Legislature, by law, clearly has not.

In this subsection, it is also confusing concerning what is meant, or intended, by the phrase "...assessment of the chemical, physical, biological, **and other information within the waterbody**." (emphasis added) The stated objective of the CWA is "...to restore and maintain the chemical, physical, and biological integrity of the Nation's waters", and there is no "...**and other information within the waterbody**." This insinuates some sort of land use control or zero growth agenda. The CWA clearly has no such condition, thus this must be stricken from

the proposed rule.

Further in this subsection, at "a.", it is not appropriate that "all" was stricken. If a water is suited for wading or rafting, yet is 303(d) listed as impaired for cold water biota support status, such a water cannot be a Tier II high quality water. The proposed rules to date have been replete with efforts to make all state waters Tier II, clearly contradicting science and Legislative intent. Finally, there is no requirement under the CWA to presume that waters not assessed are Tier II waters, therefore all such presumptions must be stricken from the rule.

9) Under proposed 052.04, first sentence, "always" must be deleted due short term and restoration exemptions. The end of this same sentence (e.g. "...no degradation of water quality may be allowed that would cause or contribute to violation of water quality criteria.") must be deleted because it mandates "zero", which is not supported by the specific antidegradation language of either IC or the rule policy. Antidegradation is to protect the uses, not a criteria number that is based upon mathematical manipulations and derived under laboratory conditions with hypothetical solutions and sensitive organisms, organisms which may not even exist in Idaho waters. Further, criteria have margins of safety ignored even if this process were legally valid. This entire subsection subverts the intent of protecting actual uses. Further, as written, the rule would limit an "activity" and we see no reason to include this word other than to support a no-growth interpretation or agenda, which is contrary to Legislative intent.

10) The entirety of proposed 052.05 is based upon zero measurable change, with absolutely no mention of the uses to be protected (e.g. "...whether an activity or discharge results in an improvement, no change, or degradation of water quality"), which again ignores the intent of the law. Further, 05.a. can be interpreted as negating the potential for tiered permit limits based upon real world flow conditions. In addition, the inclusion of any "new" parameter into an existing permit, insinuating a "new" discharge even though this parameter may have been present in the discharge for many years, can negate the fact that the instream biological community is healthy, while invoking an unnecessary paperwork "check the box" process.

11) As mentioned in above comments, existing discharges must be exempted clearly from both antidegradation review, as commented above, and antidegradation analysis in 052.06. Rules are prospective unless specifically authorized by Idaho law as having retroactive applicability, which is not the case with the alleged absence of an implementation process for Idaho's antidegradation policy (see Hecla's introductory comment above). This must clearly be addressed under the definition of "new activity or discharge" by specifying that "new" is tied to a trigger date. This date must coincide, by rule definition of "new activity or discharge", to the July 1, 2011 date shown in the draft rules at 052.06.b.i. By use of this date, is DEQ insinuating a change to IC will be required for this rulemaking? Absent this clarification, no end to potential mischief is to be found. For example, if "new" is not limited to the July 1, 2011 trigger date, coupled with the fact no "authorization" may have existed when an "activity" first occurred, would all land disturbances with point and/or nonpoint discharges now require antidegradation analysis? This would include all historic public and private roads, farms, cities, industrial sites, etc., where "discharges" occur. "Existing" must be exempt, and "new" must have the July 1, 2011 trigger date for antidegradation review and/or analysis.

12) Hecla supports the comments of the Idaho Association of Commerce and Industry (IACI) dated 7 July 2010, on "Insignificant Discharges".

13) Concerning proposed "Special Resource Waters (SRW)" inclusion into the implementation of the antidegradation policy at proposed 052.08, we repeat our concerns expressed in our comments of 28 April 2010 that SRW inclusion is more stringent than required under the CWA, thus violates IC, and must be removed from rules addressing antidegradation policy implementation. In addition, the history of the SRW process is clear that designated uses and/or water quality has no significance in the original application of SRW status to a waterbody. Further, given the current status of water quality controls and protections, SRW status is no longer necessary and should be removed from Idaho rules.

14) There are significant concerns associated with proposed additions and deletions to "Definitions" as follows:

- As stated in our comments of 28 April 2010, the definition of "Lower Water Quality" is mandated by IC, thus cannot be stricken from the rules! This IC definition clearly ties the concept of "lower water quality" with a "beneficial use", as mandated by the IC language for the antidegradation policy. Further, the proposed definition of "Measureable" does not currently exist in Idaho rules and it appears to be replacing the definition of "Lower Water Quality", which is mandated by IC. This proposed definition circumvents the tie of water quality with beneficial uses that is requisite in meeting Legislative intent of IC 39-3603, thus the proposed definition of "Measurable" must be deleted.

- The proposed definition of "Degradation or Lower Water Quality" circumvents the IC tie of water quality with maintaining beneficial uses. The IC definition of "Lower Water Quality" is very clear in both meaning and intent, e.g., "Lower Water Quality" must be "A measurable **and adverse** anthropogenic change in a chemical, physical, or biological parameter of a water **relevant to a beneficial use**..." (emphasis added) As mentioned above, water quality criteria have remote ties to reality, thus a beneficial use can be protected by a range of water quality, which very well may be above a criteria value. This concept is reflected by IC language and must be followed by any rules intended to implement the law. Additional concerns with this proposed definition is the inclusion of the term "or load". A mixing zone analysis is based upon instream concentration, not load, and we need to know if DEQ intends that this definition will further restrict or eliminate mixing zones? If not, there is no need to change the word "full" to nebulous term "appropriate". We have further concerns as to whether or not this proposed definition will in any way void tiered permit limits. Is this DEQ's intent? Further, it appears this definition is also designed to make proving "insignificant discharge" exponentially more difficult, as "critical conditions" are subject to numerous assumptions that may not occur within a 10-year interval, which is a confidence interval overkill. In short, this definition must be deleted and the deleted definition of "Lower Water Quality", reinstated as mandated by law.

  On this same point, the proposed definition of "Assigned Criteria" as "...those associated

with the designated, presumed, and any existing uses…" is entirely contrary to IC because the law makes no "presumption"; either the use is either designated or existing, thus "relevant". The words "associated with" must be changed to "relevant to" and the word "presumed" must be stricken to meet the law's intent.

- The proposed definitions of both "Existing Activity or Discharge" and "New Activity or Discharge", as commented in #11 above, are unworkable and prone to mischief. Any "activity or discharge" existing on July 1, 2011 must be considered "existing", whether or not it had been "authorized" in the past, when such a process may not have either existed or been required. Further, discharges occurring under superfund oversight must be considered "authorized", due to superfund's overriding authority over other federal environmental statutes.

- The proposed definition of "Permit or license" must be changed to a definition of "Authorization", with the definition encompassing "a permit, license, or any activity occurring under superfund". Thus, the term "permits or license" in the rule should be replaced with "authorization".

  Alternatively, a new definition of "Existing Activity or Discharge" as "An activity producing a discharge of pollutants to navigable waters that has been previously authorized in a permit, license, or actions taken under Superfund, RCRA, or the Endangered Species Act." If this approach is taken, the word "authorized" needs to be added to the last sentence under the definition of "New Activity or Discharge".

15) The above comments on draft #6 and revision are not considered to be all-inclusive. As commented above, the proposed rule does not incorporate the legislative format, thus Hecla's not commenting on all potential aspects of the subject proposed rule draft shall not be considered an acceptance of language new to the existing Idaho rules. We expect a full and detailed comment when the final proposed rule is published in legislative format in the Administrative Bulletin.

Sincerely,

Dan Halland for

Paul L. Glader
Manager – Environmental Services