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Idaho Department of Environmental Quality
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Re: Docket No. 58-0102-1033, Anti-degradation Rulemaking Comments Following Passage of House Bill 153

Dear Don and Paula,

GYC submits the following comments in regards to Rulemaking initiated to make the language on implementation of antidegradation procedures in Idaho's water quality standards consistent with changes in state law brought about by the 2011 Legislature's passage of House Bill 153.

GYC has a strong interest in the management of Idaho waters and their associated wildlife and recreational resources. GYC's members regularly use and enjoy Idaho waters for activities such as fishing, hiking, boating, hunting, wildlife viewing, spiritual renewal, biological and botanical research, photography, and other pursuits. GYC's members' use and enjoyment of Idaho waters may be substantially impacted if IDEQ approves anti-degradation rules that do not adequately protect the health and quality of these waters.

GYC believes that Idaho's proposed antidegradation rules still need significant changes in order to comply with the Clean Water Act and to sufficiently protect Idaho's waters. Specifically, GYC comments on the following provisions:

1. **052.01 and 052.05. Idaho's proposed "waterbody by waterbody" approach in determining when Tier 2 protection will be provided is unlawful.**

Such an approach is not sufficiently protective of Idaho waters and allows IDEQ too much discretion in implementing these decisions. Additionally, EPA has stated that due to "substantial comments concerning the scope and protectiveness of the waterbody approach to Tier 2," EPA is evaluating changes to allowing such an approach and thus "it is possible that EPA would not be in a position to approve Idaho's waterbody approach when adopted." EPA Letter at 5-6 (Oct. 1, 2010). Rather than stick with an antiquated approach that is likely to be determined insufficient by EPA, Idaho should adopt a parameter by parameter approach to Tier 2 review.

2. **052.03. Antidegradation review must be done at both the General Permit level and the Individual Permit level.**

IDEQ must ensure that all general permits and individual permits adequately address antidegradation and this requirement should be stated explicitly. As written, subsection 052.03 states that "[f]or general permits that the Department determines adequately address antidegradation, review of individual applications for coverage will not be required unless it is required by the general permit." This statement should be removed and IDEQ should require antidegradation review at both the general permit level and the individual permit level for all activities. It is insufficient to conduct an antidegradation review only at the general permit level, at a point when the specifics of the activity are not fully analyzed.

Additionally, as EPA noted in its letter dated October 1, 2010, IDEQ must ensure that antidegradation is adequately addressed at the general permit level. For this reason, EPA suggested that IDEQ clarify that "[f]or general permits that the Department determines do not adequately address antidegradation," the provision should add the requirement that "the Department shall ensure that antidegradation is adequately addressed." Additionally, EPA suggested adding language noting that if antidegradation is not adequately addressed, IDEQ may require an individual permit or may deny certification. Although GYC believes that antidegradation review should also be required at the individual permit level for all projects, nevertheless we agree with EPA that at a minimum, this language must be added to this subsection. Without it, IDEQ is not clarifying the legal requirement that these permits must ensure that antidegradation is adequately addressed, and further is constraining its options for action where a general permit does not adequately address antidegradation. Such a weak provision, as written, will not pass legal muster.

3. **051.03. For Outstanding Resource Waters receiving Tier III Protection, IDEQ must state that no degradation will be permitted.**

The provision describing ORWs simply states that "water quality shall be maintained and protected from the impacts of point and nonpoint source activities." IDEQ

should add a sentence to the end of this provision explicitly stating that no degradation is allowed to ORWs.

4. IDEQ has proposed broad exemptions to antidegradation review that are unlawful.

a. 052.02 Restoration Projects

IDEQ has failed to sufficiently define restoration projects. Because there is no definition of restoration projects, GYC fears that dischargers may attempt to represent their projects as "restoration projects" or connect projects to "restoration projects" in order to avoid antidegradation review. As written, the provision exempting restoration projects is also too broad. It allows for seemingly any "changes in water quality" without antigradation review "where determined necessary." If an exemption for restoration projects is maintained, only temporary and short-term changes should be allowed, and this should be explicit in the provision. Also, IDEQ should define more certainly what parameters IDEQ will use to determine the extent of changes that will be allowed without antigradation review where "necessary." Additionally, as EPA suggests, IDEQ should include a statement in the provision noting that even restoration projects must implement reasonable pollution control measures." EPA Letter at 5 (Oct. 1, 2010). The provision requiring restoration project to implement best management practices does not satisfy EPA's concern.

b. 052.08.a Insignificant Activity or Discharge

IDEQ should not create an exemption to antidegradation review for "insignificant" activities or discharges without undergoing a complete analysis of the anticipated discharges. IDEQ should make clear that the applicant must provide the following information in any application claiming an "insignificance" exemption:

1) Quantity and concentration of the parameters expected to change as a result of the proposed activity;
2) Length of time that the water quality is expected to be changed;
3) Character and nature of the discharge;
4) An analysis of the existing water quality of the receiving water, and any other downstream waters which may be reasonably expected to be impacted;
5) Proposed management practices that will be used to protect water quality.

The provision should indicate that the Department shall determine insignificance "based on all available information, including public comment." Adding this language will allow the public to weigh in on potentially significant changes that

the Department may not recognize at first glance which may not be highlighted by the applicant.

Finally, IDEQ should require monitoring to verify compliance with these provisions are being maintained. IDEQ should retain the right to determine at any time that the activity or discharge is no longer "insignificant" as described in these provisions, and at that point shall require the applicant to comply in full with all antidegradation policies.

5. 052.07 Tier I Review. This subsection does not go far enough to sufficiently protect existing uses.

Section 052.07, while dramatically improved from the September 2010 Proposed Rule, still does not go far enough to sufficiently protect existing uses. IDEQ should explicitly state that in all cases, water quality better than that provided by Idaho's criteria will be ensured fi necessary to protect existing uses. EPA noted this same concern, and yet it has not been addressed in the revised proposed rule. See EPA Letter at 1-2 (Oct. 1, 2010). Moreover, IDEQ should clarify that water quality will be maintained to protect not only existing uses but also anticipated uses.

6. 010.19 "Degradation or Lower Water Quality" is written too narrowly to ensure protection of designated or existing uses.

Subsection 010.19 states that degradation or lower quality means a change in concentration of a pollutant that is "adverse to designated or existing uses" from discharge. As written, GYC is concerned that IDEQ is given wide discretion to determine what is "adverse." IDEQ must state within this provision that any worsening of water quality is considered degradation, or otherwise must add a definition of "adverse to designated or existing uses" that explains that any worsening of water quality is considered adverse to uses. Additionally, this provision should include a statement clarifying that worsening of water quality includes failure to maintain water quality for existing uses, and failure to improve water quality when necessary to protect existing uses. EPA noted similar concerns regarding the vagueness of the phrase "adverse to [designated or existing] uses." EPA Letter at 3-4 (Oct. 1, 2010). IDEQ should also state that this definition applies to potential uses.

Perhaps more concerning, this provision now includes the phrase "as calculated for a new point source, and based upon monitoring or calculated information for an existing point source increasing its discharge", (emphasis added), seemingly thus limiting application to point sources to the exclusion of nonpoint sources. This is unlawful and must be removed to include point sources and nonpoint sources alike. Additionally, this provision cannot only apply to new point sources or existing point sources increasing its discharge, but must apply to all existing point sources. This is especially important where an existing point source is applying for a renewed permit, but may not be increasing its discharge.

7. 052.06.a.i. Current Discharge Quality must not be limited to available discharge quality data.

If there is a proposal to increase the discharge of a parameter of concern that has not been previously monitored, subsection 052.06.a.i states that "current discharge quality shall be based on available discharge quality data collected within five years of the application for a permit or license or other relevant information." EPA asks that IDEQ add a sentence stating that "[t]he department may require additional information from the applicant, including data from additional discharge monitoring, as necessary to evaluate the effect of an activity or discharge on water quality." EPA Letter at 6 (Oct. 1, 2010). While we agree with EPA that this section as written does not ensure that information sufficient to characterize the current discharge quality will be obtained, we do not believe that EPA's suggestion goes far enough to resolve this issue. As revised, the addition of the phrase "or other relevant information" certainly does not go far enough. IDEQ should add a statement that if no data from additional discharge monitoring is currently available, the applicant must obtain monitoring and report the results to IDEQ, and such data must be sufficient to characterize the current discharge quality for the parameter of concerns before approving or denying any proposal to increase or add the discharge of a parameter. Without this requirement, IDEQ would have the option of requesting additional information but would not be required to do so, and thus could make uninformed decisions about the discharge quality.

8. 052.08.c.iv. Tier II Analysis selection of the preferred alternative cannot put cost above environmental considerations.

As written, subsection 052.08.c.iv seems to elevate the consideration of cost above all other considerations, including environmental considerations, in selecting the preferred alternative. Especially concerning is 052.08.c.iv(4), which provides that the applicant must "[s]elect the least degrading option or show that a more degrading alternative is justified based on" other subsections, including "economic impacts," "cost effectiveness at pollutant reduction," and "environmental costs and benefits." This provision seems to give the applicant a wide open door to choose whatever alternative it wishes as long as it can "justify" its choice based on factors such as environmental impact or cost effectiveness. In other words, this provision serves to award the applicant with such wide discretion that Tier II waters are guaranteed essentially no protection. GYC suggests that IDEQ rework these provisions to ensure that environmental considerations and protection of water quality are given weight above other factors.

9. Appealable actions.

The anti-degradation policy does not specify what actions are subject to appeal. At the very least, the rules should state that final Department determinations on degradation may be appealed. Such appeals should be available to the applicant as well as any other interested person or organization.

10. Public comment and participation.

The rules should specify that public notice and comment will be available after an applicant makes an initial application for a new permit or a reissued permit for all point sources, and before the Department makes a recommendation or decision on the proposed activity. Public notice and comment should also be available for all Tier II analyses. Specifically, it is important that the public have input into the alternatives analysis. While the rule implies that public notice is required in subsection 052.08.e.ii., stating the Department shall review all pertinent information "after . . . public notice and input," the rules should specify that public notice is required, and the time period in which the Department will accept comments (ex. 90 days). Additionally, and interested person should have the opportunity to request a public hearing.

11. 052.08 should add a section describing information necessary for all applications to degrade water quality.

Applicants should be required to include, at a minimum, the following information for all applications to degrade water quality:

a. Description of the proposed activity;
b. The proposed water quality limits and the reasons therefor;
c. Analysis of existing water quality;
d. Analysis of anticipated water quality for ground water and surface water for all alternatives;
e. Analysis of ground water flow and analysis of ground and surface water interaction;
f. Data of cumulative water quality effect of existing and proposed activities; and
g. Monitoring and reporting plan.

GYC is also concerned with the alternatives analysis as listed in 052.08.c. is insufficient to protect water quality in Idaho. As written, it states that "[d]egradation will be deemed necessary only if there are no reasonable alternatives to discharging at the levels proposed." (emphasis added). This leaves the applicant and IDEQ too much discretion to determine if there are "reasonable" alternatives. Stricter language must be substituted so that degradation is only deemed necessary if there are no feasible alternatives. "Feasible" should be substituted for "reasonable" throughout this provision. As an example, Montana rules state as follows: "In order to authorize degradation under this rule, the department must determine that the least degrading water quality protection practices determined by the department to be economically, environmentally, and technologically feasible will be implemented prior to, during, and after the proposed activity until the degradation no longer occurs." See ARM 17.30.707(6).

Finally, these provisions should clearly state that the burden to show necessity is on the applicant. GYC suggests that IDEQ include a provision such as the following: "The Department will deny an application to degrade water quality unless the applicant has affirmatively demonstrated and the Department finds that based on a preponderance of the evidence, the proposed activity is necessary for important economic or social development and no feasible alternatives that would be more protective of water quality exist."

GYC hopes that IDEQ will take into account the foregoing comments in order to ensure protection for Idaho waters.

Sincerely,

/s/ Andrea Santarsiere

Andrea Santarsiere