



Greater Yellowstone Coalition

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Idaho Department of Environmental Quality
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Re: Comments re: Idaho Antidegradation Implementation Procedure (August 5, 2011 Draft)

Dear Paula and Don,

GYC submits the following comments and suggestions in regards to the August 5, 2011 draft of the Idaho Antidegradation Implementation Procedure drafted by Idaho Department of Environmental Quality (“DEQ”).

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 DEQ approves anti-degradation rules that do not adequately protect the health and quality of these waters.

1. What is Antidegradation? (Executive Summary, page i)

Under the “What is Antidegradation?” section of the Executive Summary, GYC suggests that DEQ delete the following sentences:

“If the water receiving the discharge is of high quality, significant degradation in water quality is evaluated closely to determine if it can be minimized or avoided. If significant degradation cannot be avoided, then the activity is evaluated to determine if it is necessary and important to the social or economic health of the affected public.”

These sentences suggest that antidegradation only applies to waters “of high quality,” which of course is not the case. Because antidegradation applies to Tier 1, Tier 2, and Tier 3 waters, GYC suggests that DEQ either delete the above-referenced sentences or include more information here to state how antidegradation applies to all Idaho waters. As is, the paragraph could mislead readers to believe that waters not considered “of high quality” are exempt from antidegradation review.

2. Three Tiers of Protection (Executive Summary, page i)

- a. Under the “Three Tiers of Protection” section of the Executive Summary, GYC suggests that DEQ change the description of Tier 2 waters. The section currently reads as follows:

“Tier 2 – is the middle level of protection. Protection consists of making sure degradation is ‘necessary to accommodate important economic or social development.’”

As currently written, this section seems to promote necessary degradation, rather than focusing on preventing unnecessary degradation under the aims of the Clean Water Act. GYC suggests this section is changed as follows:

“Tier 2 – is the middle level of protection. Degradation of Tier 2 waters is not permitted unless ‘necessary to accommodate important economic or social development.’”

Although the end goal is clearly the same, this rewording stays true to the purpose of antidegradation review.

- b. Under the “Three Tiers of Protection” section of the Executive Summary, GYC suggests deleting the following paragraph:

“Most of the interest in antidegradation is on Tier 2. This is where antidegradation can work to maintain high quality water and is also where

dischargers will have to potentially go through extra effort to reduce or justify their proposed degradation of water quality.”

GYC sees several issues with this paragraph. First, it seems inappropriate for DEQ to determine where the “interest” in antidegradation lays. This seems like more of an opinion than a policy statement. Second, once again the wording does not suggest prevention of unnecessary antidegradation, but rather seems to promote necessary degradation. Stating that discharges “will have to potentially go through extra effort to reduce or justify their proposed degradation” suggests that degradation will be permitted, rather than acknowledging that unnecessary degradation shall not be permitted to protect Tier 2 waters. GYC suggests deleting this paragraph in its entirety.

3. Non-degrading, Degrading and Insignificantly Degrading (Executive Summary, page iii)

The last sentence of the section entitled “Non-degrading, Degrading and Insignificantly Degrading” in the Executive Summary is confusing and should be reworked. As written, the sentence currently reads:

“Although protection is afforded on a water body basis, evaluation of degradation is by pollutant for those pollutants of concern in a discharge.”

It is unclear what would constitute a “pollutant of concern,” and because all pollutants that would degrade water quality would be “pollutants of concern,” we believe this sentence should be reworked to convey this. GYC suggests the following:

“Although protection is afforded on a water body basis, degradation is evaluated on a pollutant basis.”

4. Analyzing Significant Degradation of High Quality Water (Executive Summary, page iii)

a. The first paragraph should be deleted. It currently reads as follows:

“Although only a small number of activities reviewed may lead to significant degradation of high quality water this is where the implementation effort will be the greatest and the effect of antidegradation policy in slowing degradation of water quality can really make a difference.”

This entire paragraph is opinion-based and provides no policy or guidance for the reader. Additionally, the goal of antidegradation is not to “slow” degradation, but to prevent it all together. I believe these points were raised

during the August 5, 2011 call, and thus this paragraph may already be deleted.

- b. The second paragraph also starts off as confusing. The first sentence of the second paragraph currently reads as follows:

“One of the conditions for allowing significant degradation of high quality water is that other source controls be achieved for both point and non-point sources.”

Once again, the “for allowing significant degradation” language seems to be promoting degradation. GYC suggests the following minor changes to ensure that degradation is prevented where necessary and readers are not confused:

“One of the conditions that must be met before significant degradation of high quality water is permitted is that other source controls be achieved for both point and non-point sources.”

Similarly, GYC suggests changing the first sentence of the third paragraph from:

“The other major condition that must be met in order to approve significant degradation of high quality water is that it be shown to be ‘necessary to accommodate important economic or social development.’”

To:

“The other major condition that must be met before significant degradation of high quality may be permitted is that the applicant must demonstrate it is ‘necessary to accommodate important economic or social development.’”

This change removes the implication of promoting degradation while simultaneously showing that the burden to show necessity falls on the applicant. The current “be shown to be” language is passive and will not pass the grammar review.

- c. Finally, in order to show that the burden is on the applicant, to demonstrate that these factors are not optional but are requirements to permitting degradation, and in the interest of avoiding the passive voice and fragmented sentences, GYC suggests the following changes be made to the last two paragraphs of this section:

“First, assessing the necessity of degradation by finding ways to reduce or eliminate increases in discharge of pollutants or lessen their impact on

water quality. Secondly, demonstrating there is a social or economic justification (SEJ) for degradation that cannot be reasonably avoided.”

Should be changed to:

“First, the applicant must assess the necessity of degradation by finding ways to reduce or eliminate increases in discharge of pollutants or lessen their impact on water quality. Second, the applicant must demonstrate there is a social or economic justification (SEJ) for degradation that cannot be reasonably avoided.”

Further,

“A new or proposed increase in discharge of pollutants could be rejected either because it is unnecessary or because it is not justified. If reasonable ways to reduce degradation can be found then the analysis will come down to showing there is a social or economic reason to accept the degradation that is proposed.”

Should be changed to:

“A new or proposed increase in discharge of pollutants will be rejected if it is unnecessary or it is not justified. If reasonable ways to reduce degradation are available, then the applicant must choose the least degrading alternative or show that a more degrading alternative is justified due to social, economic, or environmental considerations.”

These changes more accurately mirror the proposed regulations, and replace unclear language such as “the analysis will come down to” with the real requirements of the regulation.

5. Glossary

a. “Administrative Record”

The explanation of administrative record is “[d]ocuments and information that support an administrative action identified or created before the action is taken.” This explanation, however, erroneously excludes documents relied on or considered that may not “support” the decision. GYC suggests changing the definition to “[d]ocuments or information reviewed, considered, identified, created, or relied on before administrative action is taken.”

b. “Affordable”

The definition for affordable is extremely concerning for GYC and impermissibly limits reasonable alternatives to those “being within the financial means of most dischargers or activities.” This is not in any way

representative of the proposed regulations. GYC proposes deleting this “explanation” in its entirety. Alternatively, GYC proposes deleting the last sentence of the definition, which impermissibly implies that alternatives that are not affordable are not reasonable alternatives for Tier 2 antidegradation analysis. Because we do not see where “affordable” shows up in the regulation, we do not believe this definition is necessary or helpful to readers. It should not be defined simply because it is used in the guidance document.

c. “Cost-effectiveness”

Because cost-effectiveness is just one factor that goes into determining the appropriateness of alternatives, GYC again is concerned that this definition implies that an alternative that is low in cost-effectiveness may not be considered reasonable. GYC would change the second sentence to read as follows: “In comparing alternative treatment methods, if there is a large jump in cost per unit mass for a relatively small gain in pollutant removal it may be said that the alternative is not cost-effective.” GYC would delete the sentence stating that “[d]ifferences of less than 10% in cost per unit mass of pollutant removed may be considered to be the same.” Whether an alternative is cost-effective should be considered on a case-by-case basis in conjunction with several other factors.

d. “Less-Degrading Alternative”

This is currently defined as “[a] reasonable alternative to a proposed activity or discharge that would result in less degradation to water quality than the minimum level of pollution control.” While a less-degrading alternative may not be considered reasonable for purposes of the alternatives analysis and thus may not become the preferred alternative, nevertheless this definition cannot be confined to state that only “reasonable” alternatives are considered “less-degrading alternatives.” Indeed, the regulation makes it clear that the applicant must identify the least degrading alternative that is reasonable by considering a number of factors. For this reason, GYC strongly suggests deleting the word “reasonable” from this definition.

e. “Non-Degrading Alternative”

This has the same issue as discussed above with “less-degrading alternative.” GYC strongly suggests deleting the word “reasonable” from this definition, as whether a non-degrading alternative is considered reasonable is evaluated later under specific listed factors.

f. “Reasonable”

GYC is surprised to see that DEQ is trying to explain what is “reasonable,” even after acknowledging that what is reasonable is identified based on case-specific information. GYC strongly suggests that the second sentence be deleted, stating that “[g]enerally speaking, non-

degrading or less-degrading pollution-control alternatives shall be considered reasonable where the costs of such alternatives are affordable.” GYC has explained above that it does not believe the definition of “affordable” in this guidance is appropriate, but GYC also believes that in accordance with the regulations, whether an alternative is “reasonable” depends on an evaluation of several criteria, and cannot be defined in terms of “affordability.” This definition tries to confine what is “reasonable,” and doing so is impermissible and in contradiction to the plain language of the regulation.

g. “Tier 2 Protection”

In order to emphasize that prevention of antidegradation is the goal and not promotion of antidegradation, GYC suggests changing the first sentence from:

“Policies and procedures that require an analysis of reasonable alternatives and social or economic considerations to justify significant degradation or a determination the degradation is insignificant.”

To:

“Policies and procedures that require an analysis of reasonable alternatives to determine if significant degradation is justified based on social or economic considerations.”

Because the alternatives analysis only applies to “significant degradation,” the second part of the sentence stating an analysis is needed to make a determination of significance is incorrect and should be removed.

6. Emergency Actions (page 5)

The section regarding emergency actions is extremely vague and seems to offer DEQ unlimited discretion. It would be helpful if the guidance at least provided some examples of what may be considered an “emergency action.” For example, is an emergency apparent when human lives are at risk? Large amounts of fish or wildlife at risk? Other examples?

7. 5.3 Assuring Necessity through Analysis of Alternatives to Degradation (pages 48-54)

DEQ has added “affordability” as a consideration in the guidance document discussing the required alternatives analysis for Tier 2 degradation. Affordability, however, is not a factor to be considered per the proposed regulation. The proposed regulation calls for consideration of three factors in selecting the preferred alternative: (1) economic impacts (total cost effectiveness, incremental cost effectiveness), (2) cost

effectiveness at pollutant reduction, and (3) environmental costs and benefits across media and between pollutants. DEQ cannot add a fourth criteria to the regulation through guidance documents that are meant to interpret the regulation, not expand the regulation.

Additionally, the description of “affordability” provided in section “AA Step 4 – Judging affordability” is extremely concerning. It states that the affordability will be determined by the applicant, and that standard industry practices should guide affordability determination. This paradigm, however, is not forward looking and does not encourage dischargers to implement new and improved technologies that may be a bit more costly but have provide large environmental improvements. Rather, the applicant is given an out by simply saying that it costs too much and that it is not “standard industry practice.” In reality, as written, this guidance provides the applicant with so much discretion that it could always argue that the cheapest alternative is the only “affordable” one. The regulations do not provide the applicant with this out and neither should the guidance.

GYC strongly urges DEQ to remove any and all references to affordability as a consideration to be considered in choosing a preferred alternative, including section “AA Step 4 – Judging affordability” on pages 53-54.

8. 6.1 Point Source Activities (page 60)

DEQ does not have discretion to allow discharge from a point source that would degrade water quality in a Tier 3 ORW, thus, the last line of the third paragraph should be changed from:

“However, if the calculations demonstrate that the degradation of the ORW is not fully and completely offset by reductions upstream of the degradation the point source discharge may not be allowed.”

TO

“However, if the calculations demonstrate that the degradation of the ORW is not fully and completely offset by reductions upstream of the degradation the point source discharge will not be allowed.”

9. 7.1 Antidegradation Review of General Permits – Existing General Permits (pages 62-63)

The guidance currently mentions that there are eleven general permits that are currently effective in Idaho and two general permits that are in draft form. The guidance seems to treat the two draft permits as existing, but

because these permits are only in draft form, there is no question that they should not be treated as existing as of July 1, 2011. These two draft permits must fall under the requirements of New General Permits. Thus, this section should only reference and list the 11 existing general permits.

10. 7.1 Antidegradation Review of General Permits – New or Reissued General Permits (pages 63-64).

As written, this section only requires DEQ to ensure that general permits satisfy the requirements of Tier 2 analysis. DEQ must also ensure that Tier 1 requirements are met, however. Thus, GYC suggests adding to the following sentence to ensure Tier 1 requirements are properly met:

“Antidegradation reviews will focus on pollutants that may contribute to water quality degradation, and will examine whether water quality criteria are met, whether degradation is likely to occur, and whether the permit conditions and permit record satisfies the requirements of the **Tier 1 and** Tier 2 analysis.”

As an additional note, I also believe there is an error with the following first sentence of that section, which may be corrected by adding the words in bold below:

“For general permits issued or reissued after July 1, 2011, antidegradation reviews will be conducted for the entire class of general permittees at the time DEQ reviews the permit to decide whether or not to certify the general permit **and ensure it** complies with state water quality standards.”

Finally, the guidance should not assume that existing activities or discharges that are required to be permitted for the first time under a new general permit that are not proposing to expand will be deemed not to cause degradation simply because “there mere fact of becoming regulated will limit their discharge for the first time and will be a step toward reducing their degradation of water quality.” DEQ should reconsider requiring existing activities or discharges required to be permitted for the first time under a new general permit to under Tier 2 analysis.

11. 7.3 Federal Energy Regulatory Commission Licenses (page 65)

The last line of this section reads as follows: “If this comparison shows there will be no degradation in water quality, then no Tier 2 antidegradation analysis is necessary.” Because one can argue that it does not necessarily follow that where there will be degradation in water quality, a Tier 2 analysis is necessary, GYC suggests adding a line to that effect.

12. 8.2 Public Notification and Review (pages 66-67)

GYC suggests that in addition to posting public notices regarding certification decisions on its website, DEQ also commits to publish decisions in relevant local papers and the Idaho State Journal. Doing so will do more to ensure that the public is informed, considering most members of the general public do not check the Department's website on a regular basis.

13. 9 Antidegradation Review Decisions (page 68)

GYC suggests adding to the bullet point list of requirements for approving a regulated activity that may result in degradation of Tier 2 waters the following:

- The applicant has chosen the least degrading alternative that is reasonable.

14. Appendix C (page 78)

Last paragraph, second line, "discharged" should be "discharge."

15. Appendix E, High Quality Waters (Tier 2 Protection) (pages 108-113)

First, the first paragraph reads as follows: "For example, bacteria will be relevant to recreational uses, but temperature will not." Temperature, however, can affect the health of fish populations, and fishing is certainly a recreational use. Therefore, GYC suggests temperature as a pollutant to be considered for recreational uses in this example.

Second, GYC is concerned with the following assumption made in this example: "Even with the omission of fecal coliform limitations, DEQ believes the discharge will not cause or contribute to a violation of the bacteria criteria because the permit incorporates 'end-of-pipe' limitations for E.coli." While this may be true, GYC suggests DEQ would have to say more about what those 'end-of-pipe' limitations entail, and how they ensure that current levels of E.coli will not be exceeded.

16. Appendix E, Antidegradation Review of Blackfoot Bridge Phosphate Mine (pages 116-121)

GYC would like to note several concerns with the antidegradation review of the Blackfoot Bridge Phosphate Mine, and using this review as an example in guidance documents.

First, DEQ notes that "[t]he segment of the Blackfoot River adjacent to the project is also considered a Special Resource Water (SRW)." If this is true, why is there no Tier 3 review?

Second, the Blackfoot River is listed as an impaired water body under Idaho's 303(d) list for selenium. DEQ, however, has thus far failed to set a TMDL for selenium. Why is this not mentioned and dealt with? How does DEQ justify a new selenium discharge on a river already listed as impaired for selenium?

Third, DEQ assumes that "[b]ecause P4 has coverage under the CGP, DEQ believes that the highest statutory and regulatory requirements are in place." There is no explanation of what CGP is, or what it stands for, and thus it is hard to make a determination as to whether this assumption is reasonable.

GYC hopes that DEQ will take into account the foregoing comments and suggestions before releasing these guidance documents for public review. Please feel free to contact me with any questions. Thank you in advance for your consideration.

Sincerely,

/s/ 
Andrea Santarsiere