



CORPORATE HEADQUARTERS

October 1, 2010

**SENT VIA MIAL TO: [paula.wilson@deq.idaho.gov](mailto:paula.wilson@deq.idaho.gov)**  
**ORIGINAL SENT VIA CERTIFIED MAIL# 7008 1830 0000 7682 5959**  
**RETURN RECEIPT REQUESTED**

Ms. Paula J. Wilson  
Hearing Coordinator  
Idaho Department of Environmental Quality  
1410 North Hilton  
Boise, ID 83706

Dear Ms. Wilson:

The J.R. Simplot Company (Simplot) offers these comments on the Proposed Rule Docket No. 58.0102-1001 Antidegradation Policy Implementation.

Simplot has numerous facilities in Idaho engaged in food processing, fertilizer manufacturing, mining, and other agriculture-related operations. Some of these operations have NPDES permits, stormwater permits or discharge to municipalities that do have discharge permits. Thus, Simplot has a direct interest in the proposed Antidegradation Policy Implementation.

Representatives from the J.R. Simplot Company have been a part of various trade associations (Idaho Association of Commerce and Industry, Idaho Mining Association and Northwest Food Producers Association) who have been involved in the development of this proposed rule. As comments from these trade associations state, this proposed rule will have a significant effect on the Clean Water Act permitting in Idaho. The ability to obtain wastewater permits in a timely and reasonable manner is very important to adapt to changing business conditions and needs. It is important to have antigradation policy implementation procedures that achieve the needed environmental protection yet provide a predictable, practicable regulatory process. Simplot has the following commitments on the proposed rule to achieve these objectives.

### **1. Identification of Tier I and Tier II Waters**

A core element of the antidegradation procedures is the identification of Tier I and Tier II waters.<sup>1</sup> The proposed rule allows for waters that do not support beneficial uses to be classified as Tier II waters if certain biological criteria are met. Also, the proposed rule does not provide for DEQ listing Tier I and II waters. Simplot believes that the

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<sup>1</sup> Tier III waters are identified by statute.

antidegradation program should: (1) Use existing regulatory structures as much as possible, (2) make use of existing assessment determinations and (3) provide a regulatory process that is clear as to how it works and what is required of the regulatory community.

#### 1A. Classification of "Waters": Impairment vs. Beneficial Uses

The water quality program has its foundation in the establishment of various beneficial uses and then establishes the criteria (numeric and narrative criteria) to determine whether or not those uses are being met. The most common ones for Idaho waters are cold-water biota and recreation contact (either primary or secondary). If water quality data shows that the numeric and/or narrative criteria are not being met, then it is determined that such a water is not meeting specific beneficial uses and a regulatory process is started to restore the beneficial uses.

The proposed antidegradation rule introduces a new definition in the classification of waters by using the term "impairment."

##### **010.49. Impairment.**

a. For the purpose of determining the appropriate level of antidegradation protection, impairment means:

- i. For aquatic life uses, that two or more major biological groups such as fish, macroinvertebrates, or algae have been modified by human activities significantly beyond the natural range of the reference streams or conditions approved by the Director in consultation with the appropriate basin advisory group; and
- ii. For recreational uses, non-compliance with those levels of water quality listed in Sections 200, 210, 251, and 275 (where applicable).

b. The Department shall utilize the current version of the "Water Body Assessment Guidance" as published by the Idaho Department of Environmental Quality, as a guide to assist in making impairment decisions.

This proposed definition of impairment in the draft rule allows a water segment that is not meeting beneficial use(s) to be classified as "not impaired" for the purposes of antidegradation, thus it could be classified as a Tier II water.

Tier II waters are defined as following:

"Where the quality of the waters exceeds levels necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water...." [IDAPA 58.01.02.051.02]

The antidegradation procedures need to work with existing water quality and permit programs rather than add new definitions which will create additional

“process” driven requirements. Reasons for why this is problematic from a regulatory and permitting perspectives include:

First, the proposed rule elevates “biological data” as being the arbitrator whether or not a water body is a Tier I or Tier II water. Simplot is not aware of any regulatory or technical reason to use biological data as being the determining factor as to how water bodies should be treated in regards to antidegradation. Clearly, EPA does not use biological assessment data to remove a water segment from a 303(d) listing. It is not clear why biological data should be used for changing determinations for “antidegradation” determinations but cannot be used for 303(d) listing purposes. DEQ has not provided any technical or regulatory justification for this approach.

Second, it is not clear what is the process for determining how the biological data, for a water segment that is not meeting beneficial uses, shows that such a water segment is not “impaired.” Such a determination may require new data and studies. This is very problematic for a permittee who is trying to get a new or expanded permit. The regulatory process needs to be straightforward and predictable; otherwise it becomes very difficult for the regulated community to implement projects. This definition of impairment adds considerable uncertainty and complexity to the permitting process.

Finally, the proposed rule creates a “double” definition that raises the issue of the appropriateness of criteria and designated beneficial uses. If the biological data show no “impairment”, then it raises the issue of whether the criteria for aquatic life uses are appropriate.<sup>2</sup>

Simplot recommends the deletion of the “impairment.”

**~~010.49. Impairment.~~**

~~a. For the purpose of determining the appropriate level of antidegradation protection, impairment means:~~

~~i. For aquatic life uses, that two or more major biological groups such as fish, macroinvertebrates, or algae have been modified by human activities significantly beyond the natural range of the reference stream or conditions approved by the Director in consultation with the appropriate basin advisory group; and~~

~~ii. For recreational uses, non-compliance with those levels of water quality listed in Sections 200, 210, 251, and 275 (where applicable).~~

~~b. The Department shall utilize the current version of the “Water Body Assessment Guidance” as published by the Idaho Department of~~

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<sup>2</sup> The State of Oregon requires that waterbodies must have water quality that meets or is better than all water quality criteria in order to be classified as High Quality Waters (HQW). Thus, Simplot's recommendation is consistent with an approach taken by other states.

~~Environmental Quality, as a guide to assist in making impairment decisions.~~

### 1B. Non-Assessed Waters

The proposed rule states that waters that have not been assessed in the Integrated Report will be “provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license.” As stated earlier in this comment letter, one the major concerns with this rulemaking is the creation of a cumbersome regulatory processes that will result in resource intensive administrative processes. It is not clear at all how such a determination will be made including what information will be needed to make such a determination. Simplot recommends that for such waters that they be classified as Tier I waters unless there is data that shows that classification as Tier II is warranted. Such unassessed waters cannot be identified as Tier II water *as there is no data to support such a determination*. Tier I designation provides for “existing uses and the water quality to protect such uses to be maintained and protected.” Thus, a Tier I designation provides protection while additional data is collected to provide a technical basis for designation.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

**052.06. Identification of Tier I and II Waters.** The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows.

b. Water bodies identified in the Integrated Report as not assessed will be provided Tier I ~~an appropriate level of protection on a case-by-case until basis using information is available to determine whether assessed uses are fully supported.~~ at the time of a proposal for a new or reissued permit or license.

### 1C. Identification of Tier I and II Waters Needs to be Integrated with Current Assessment Program

Simplot believes very strongly that the antidegradation program needs to be integrated with the existing water quality “assessment” program. DEQ already has a very well established process for classifying all waters in the State of Idaho. This system utilizes the following classification system.

**Table 1**  
**Water Segment Classification (\*)**

Category	Subcategory	Description
1		Water quality standards are presumed to be met.
2		Waters fully support the beneficial uses that have been assessed; not all beneficial uses have been assessed.
3		Insufficient data to determine if beneficial uses are being attained.
4		Waters that do not meet a standard for one or more beneficial uses.
	4a	Waters that have a TMDL completed and approved by EPA.
	4b	Waters with pollution control requirements placed on them and expected to attain the standard in a reasonable period of time.
	4c	Waters for which the standard not being achieved is not caused by a pollutant
5		Waters that do not meet the water quality standards for one or more beneficial uses due to one or more pollutants.

(\*) The *Integrated Report* refers to 'waters' as assessment units. In these comments, the term "water segments" is used to refer to the same designation.

DEQ publishes every two years an update classifying water segments (assessment units) in the state according to these categories. From Simplot's perspective, using these categories to help determine Tier I and II waters would seem to be a very logical and practical method. Table 2 shows how these categories could be used to determine Tier I or Tier II status.

**Table 2**  
**Utilization of Water Categorization for Antidegradation Tiers**

Integrated Report Category	Antidegradation Tier
1	Tier II
2	Tier II
3	Tier I initially. Can be Tier II if data becomes available to support designation.
4a	Tier I. <del>Can be Tier II if there is evidence that the standard is not being met due to natural causes.</del>
4b	Tier.
4c	Tier I. Can be Tier II if there is evidence that the standard is not being met due to natural causes.
5	Tier I

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There are several advantages to using this system. First, it uses fully the data from the assessment program for the antidegradation policy implementation procedures. There are no “duplicative definitions” or regulatory processes. Second, the preparation of the Integrated Report provides the opportunity for public comment, including the submittal of data showing whether beneficial uses are being attained or not. Finally, this category list clearly shows what waters are Tier I and what waters are Tier II, thus helping the regulated community know before initiating a project what the regulatory requirements will be.

Finally, the proposed rule does not address Special Resource Waters (SRW). Simplot recommends that each SRW be evaluated and managed for antidegradation purposes the same as any other water segment in Idaho.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

**052.06. Identification of Tier I and II Waters.** The Department will utilize a water body by water body approach in determining where Tier II protection is appropriate in addition to Tier I protection. This approach shall be based on an assessment of the chemical, physical, biological and other information regarding the water body. The most recent federally approved Integrated Report and supporting data will be used to determine the appropriate level of protection as follows.

a. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as fully supporting assessed uses (Categories 1 and 2) will be provided Tier II protection.

b. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as not assessed (Category 3) will be provided Tier I an appropriate level of protection on a case-by-case until basis using information is available to determine whether assessed uses are supported. ~~at the time of a proposal for a new or reissued permit or license.~~

c. Water bodies identified in the Integrated Report, including water bodies designated as special resource waters, as not supporting an assessed use (Categories 4a, 4b, 4c and 5) will receive Tier I protection unless the water bodies in Category 4c do not meet beneficial uses solely due to natural conditions. Such water bodies shall be identified in the Integrated Report and be approved by the Board of Environmental Quality. as follows:

~~i. For aquatic life uses, if biological data show:~~

~~(1) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~

~~(2) Impairment, then the water body shall receive Tier I protection for aquatic life; or~~

~~(3) If biological data are insufficient to determine impairment, then the water body will be provided an appropriate level of protection on a case-by-case basis using information available at the time of a proposal for a new or reissued permit or license.~~

~~ii. For recreational uses, if water quality data show impairment, then the water body shall receive Tier I protection for recreational uses.~~

#### 1D. List of Waters Protected

The proposed rule has the Department not maintaining a list of Tier I or II waters. From an implementation viewpoint, not having such a list will make it more difficult for the regulated community to plan and prepare for the regulatory process of getting a new permit or renewed NPDES permit. Simplot recommends that DEQ maintain a list of Tier I and II waters. Such a list is very helpful for the regulated community to understand what the regulatory requirements (and process) may be for getting an approval for a new or expanded discharge.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

**052.01. List of Waters Protected.** All waters receive Tier I protection. Waters receiving Tier II protection will be identified using a water body by water body approach during the antidegradation review. The Department will ~~not~~ maintain a list of Tier I or II waters. Waters given Tier III protection are designated in law.

## 2. Insignificant Discharges

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 antidegradation. Thus, insignificant discharges should be not subject to Tier II analysis. The *insignificant discharges* portion of the rule should be placed in 052.08 **Evaluation of Effect of an Activity or Discharge on Water Quality**.

Also, the criteria should just be “increase ambient concentrations by more than 10 percent.” Determining assimilative capacity can be (for some contaminants) more difficult to determine with certainty as compared to calculating ambient concentrations.

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Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

~~052.09.a.~~ 08.e. Insignificant Discharge. The Department shall consider the size and character of a discharge or the magnitude of its effect on the receiving stream and may determine that it is insignificant. If a discharge is determined to be insignificant, then no further Tier II analysis, as set forth in Subsections ~~052.09.b.~~, ~~052.09.c.~~, and ~~052.02.d.~~, shall be required.

i. In no case will the Department determine insignificance when the proposed change in the discharge, from conditions as of July 1, 2011 will:

~~(1) Increase~~ increase ambient concentrations by more than ten percent (10%); ~~or~~

~~(2) Cumulatively decrease assimilative capacity by more than ten percent (10%).~~

ii. The Department reserves the right to request additional information from the applicant in making a determination a proposed change in discharge is insignificant.

### 3. Restoration Projects

The “definition” of what are restoration projects needs to be clarified to include CERCLA or other administrative consent or voluntary orders. These type of projects are common, especially in relationship to landscape projects (mining related projects). Subjecting such projects to antidegradation review would add an unnecessary administrative step that would further delay actual “improvements on the ground.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

**052.02. Restoration Projects.** Changes in water quality may be allowed by the Department without an antidegradation review where determined necessary to secure long-term water quality improvement through restoration projects designed to trend toward natural characteristics and associated uses to a water body where those characteristics and uses have been lost or diminished. Such changes include approved mining reclamation plans, and actions taken under CERCLA. 42 USC § 9601 et seq. or state administrative or voluntary orders.

### 4. Alternatives Analysis and Socioeconomic Justification

The alternatives analysis in the proposed rule (052.09.c.) is essentially a top-down control technology requirement. There is no requirement in Idaho’s statutes or rules for using such an approach. The Idaho antidegradation policy implementation procedure needs to have factors that provide information that enable an economic evaluation of

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alternatives so that comparisons can be done for similar situations. Such information is needed to determine what is reasonable. Specific information that needs to be included in such an analysis includes:

- (A) Whether the costs of the alternative significantly exceed the costs of the proposal;
- (B) For publicly owned treatment works (POTWs) or public water supply projects, whether user charges resulting from the alternative would significantly exceed user charges for similarly situated OPTWs or public water supply projects;
- (C) For private industry, whether the alternative would have a significant adverse effect upon the project's profitability or competitive position (if the project proponent chooses to provide such information);
- (D) For any dischargers, whether treatment costs resulting from the alternative would significantly exceed treatment costs for any similar existing dischargers on the segment in question.
- (E) The relative, long-term, energy costs and commitments and availability of energy conservations alternatives.

These are very important factors that need to be considered in the alternative analysis and they need to be included in the alternatives analysis.

The proposed Idaho rule is very prescriptive for both the alternatives analysis and socioeconomic justification; the result will be a very resource intensive study of the proposed project and potential impacts not unlike a Environmental Impact Statement required under the National Environmental Policy Act. Simplot believes that the language in the antidegradation policy implementation procedure needs more flexibility so that the alternatives analysis and socioeconomic justification can match the complexity of the project and potential changes in water quality.

The portion of the Colorado antidegradation regulation for alternatives analysis and socio economic justification provides such flexibility.

Simplot recommends the following changes in the proposed rule (new language is underlined, language to be deleted has a strikethrough):

c. Alternatives Analysis. ~~Degradation will be deemed necessary only if there are no reasonable alternatives to discharging at the levels proposed.~~ The applicant seeking authorization to degrade high water quality must provide an analysis of alternatives aimed at selecting the best combination of site, structural, managerial and treatment approaches that can be reasonably implemented to avoid or minimize the degradation of water quality. To identify the least degrading alternative that is reasonable, the following principles factors shall be followed considered:

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~~i. Controls to avoid or minimize degradation should be considered at the earliest possible stage of project design. An assessment to address practical water quality control technologies, the feasibility and availability of which has been demonstrated under field conditions similar to those of the activity under review. The scope of alternatives considered shall be limited to those that would accomplish the proposed regulated activity's purpose. This assessment should include:~~

~~ii. Alternatives that must be evaluated include (where appropriate), but are not limited to:~~

- ~~(1) Relocation or configuration of outfall or diffuser;~~
- ~~(2) Process changes/improved efficiency that reduces pollutant discharge.~~
- ~~(3) Seasonal discharge to avoid critical time periods for water quality;~~
- ~~(4) Non-discharge alternatives such as land application; and~~
- ~~(5) Offsets to the activity or discharge's effect on water quality;~~

(1) Whether the costs of the alternative significantly exceed the costs of the proposal;

(2) For publicly owned treatment works (POTWs) or public water supply projects, whether user charges resulting from the alternative would significantly exceed user charges for similarly situated OPTWs or public water supply projects;

(3) For private industry, whether the alternative would have a significant adverse effect upon the project's profitability or competitive position (if the project proponent chooses to provide such information);

(4) For any dischargers, whether treatment costs resulting from the alternative would significantly exceed treatment costs for any similar existing dischargers on the segment in question;

(5) The relative, long-term, energy costs and commitments and availability of energy conservations alternatives.

~~iii. ii.~~ The Department retains the discretion to require the applicant to examine specific alternatives or provide additional information to conduct the analysis.

~~iv. In selecting the preferred alternative the applicant shall:~~

- ~~(1) Rank all technologically feasible treatment alternatives by their cost effectiveness at pollutant reduction;~~

- ~~(2) Consider the environmental costs and benefits across media and between pollutants; and~~
- ~~(3) Select the least degrading option or show that a more degrading alternative is environmentally or economically justified.~~

~~iii. The \_\_\_\_\_ degradation shall be considered necessary if there are no water quality control alternatives available that (A) would result in no degradation or less degradation of the state water and (B) are determined to be economically, environmentally, and technologically reasonable.~~

d. Socioeconomic Justification. Degradation of water quality deemed necessary must also be determined by the Department to accommodate important economic or social development. ~~Therefore the applicant seeking authorization to degrade water quality must at a minimum identify the important economic or social development for which lowering water quality is necessary and should use the~~ The following factors ~~steps will be considered for to demonstrate this determination:~~

- i. Identify the affected community or area.
- ii. Describe the important social or economic development associated with the activity.
- iii. Identify the relevant social, economic, and environmental health benefits and costs associated with the proposed degradation in water quality for the preferred alternative. Benefits and costs that must may be analyzed include, but are not limited to:
  - (1) Economic benefits to the community such as changes in employment, household incomes and tax base;
  - (2) Provision of necessary services to the community.
  - ~~(3) Potential health impacts related to the proposed activity;~~
  - (4) (3) Impacts to direct and indirect uses associated with high quality water, e.g. fishing, recreation, and tourism; and
  - ~~(5) (4)~~ (4) Retention of assimilative capacity for future activities or discharges.
- iv. Factors identified in the socioeconomic justification should be quantified whenever possible but for those factors that cannot be quantified a qualitative description of the impacts may be accepted; and
- v. If the Department determines that more information is required, then the Department may require the applicant to provide further information or seek additional sources of information.

**5. Summary.**

The Antidegradation Rules need to provide a commensurate level of review with potential for impact on the environment. For example, the antidegradation review process should utilize streamlined processes for discharges in which there are no increases in the discharge of a regulated pollutant or any increase in discharge is insignificant. This also makes good sense given the state's delicate financial situation. DEQ should focus on crafting an implementation plan that makes the most efficient use of existing and currently expected state resources. We appreciate the Department's consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Alan L. Prouty', with a stylized flourish at the end.

Alan L. Prouty  
Vice President, Environmental and Regulatory Affairs