



Idaho Association of
Commerce & Industry
The Voice of Business in Idaho®



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Hearing Coordinator
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**Re: Proposed Rule Docket No. 58.0102-1001
Antidegradation Implementation Procedures**

Dear Ms. Wilson:

The Idaho Association of Commerce & Industry ("IACI") and the Idaho Mining Association ("IMA") jointly provide these comments to the subject proposed rule.

IACI/IMA has been actively involved in the subject rulemaking since it was initiated in April 2010. IACI/IMA attended all six (6) negotiated rulemaking meetings and provided extensive written and verbal comments throughout the negotiated rulemaking process. The proposed rule has the potential to greatly expand the process and delay the timing of obtaining Clean Water Act permits and therefore has the potential to significantly affect IACI/IMA members that require Clean Water Act permits to conduct business and provide jobs within Idaho.

IACI/IMA's role in the rulemaking has been and continues to be to support a rule that meets the requirements of the Clean Water Act without unduly burdening Idaho industry during the Clean Water Act permit process. We believe this is also in keeping with the directive from the Idaho Legislature that IDEQ rules be no more stringent than the requirements in the Clean Water Act. IACI/IMA appreciates IDEQ's efforts during the negotiated rulemaking process in attempting to address our concerns. However, we believe the rule can still be better clarified and refined to avoid costly and burdensome requirements and still meet the requirements of the Clean Water Act.

First, we believe that waters identified by IDEQ (and approved by EPA) as impaired under the Clean Water Act (303(d) listed waters) should not be treated as Tier II high quality waters. During the rulemaking process, IDEQ noted that some limited subset of § 303(d) listed waters were solely on the § 303(d) list because they exceeded certain criteria such as temperature, but nevertheless fully supported aquatic life uses and were otherwise renowned fisheries. An example frequently given by IDEQ was the Lochsa River. We recognize that in certain limited circumstances it may be appropriate for IDEQ to identify a § 303(d) listed water as a possible Tier II water. Irrespective of the example of the Lochsa River, IACI/IMA strongly believe this rulemaking should not establish a dual definition of "impairment." We have recommended

changes below which are more in keeping with the unique situation in which a § 303(d) listed water should be considered a Tier II high quality water.

Secondly, although we appreciate IDEQ's attempt to describe the circumstances under which IDEQ will implement antidegradation for general permits issued by EPA and the U.S. Army Corps of Engineers ("Corps"), we believe this provision requires greater clarity. Because of the manner in which both EPA and the Corps issues general permits we believe it is appropriate for IDEQ to streamline any required Tier II analysis. For example the Corps' undertakes a detailed alternative analysis and required mitigation to ensure that a § 404 Permit has minimal impacts to jurisdictional waters. Similarly, EPA establishes Best Available Control Technology ("BAT") limits in all General Permits. Therefore IACI/IMA believes the rule should provide that IDEQ presumes that the controls required by the federal agencies in general permits are the "least degrading reasonable alternative." We also believe that for certain permits (e.g., MSGP and Construction General Permits) which require permittees to implement measures and practices which minimize or eliminate the discharge of pollutants, that IDEQ can also presume that the impact of discharges under such general permit will be insignificant. Like all presumptions, this could be rebutted during the public comment period on IDEQ's proposed water quality certification of the general permit. We have proposed language below which addresses IACI/IMA's concerns.

Thirdly, we believe based on EPA Guidance and case law that the Clean Water Act only requires that states undertake a Tier II analysis for significant degradation. Accordingly, we have proposed changes to the proposed rule which address this issue, including a clarification that a Tier II analysis shall not be required for discharges resulting in insignificant impacts. IACI/IMA does not believe it is appropriate for IDEQ to nevertheless retain discretion to require a Tier II analysis for insignificant discharge as is currently provided in the proposed rule.

Fourth, IACI/IMA believes that IDEQ must address how it will address Special Resource Waters in the proposed rule. IACI disagrees that how SRWs should be addressed under antidegradation is beyond the scope of the subject proposed rule. IDEQ's initial Notice of Intent to promulgate rules published in the Idaho Administrative Bulletin (April 7, 2010) was clear that the scope of the rule applied to all surface waters and the "various levels of protection" each water body would receive under the antidegradation policy. Moreover, IDEQ's first draft of the rule specifically proposed to treat SRWs as Tier II and 1/2 waters. IACI strongly believes that SRWs must be addressed in the proposed rule. As IACI/IMA has maintained throughout the rulemaking in written and oral comments, SRWs should be either Tier I or Tier II waters depending upon the documented water quality in these waters. If an SRW is meeting water quality standards it should be a Tier II water; if an SRW is a § 303(d) listed water it should be a Tier I water. IACI/ IMA again urges IDEQ to address this issue in this rulemaking.

Fifth, we believe use of the phrase "activities" in the proposed rule has the potential to require regulation of activities not required under the Clean Water Act. Also, we are concerned about use of the terms "critical conditions" and "design flow" in the proposed rule and how it might affect mixing zones. Therefore we have recommended changes to the rule to clarify these issues.

Sixth, IACI/IMA is concerned that the socio-economic justification and alternatives analysis is too prescriptive. Further we are concerned about how IDEQ might implement the so called "socioeconomic justification" in a Tier II analysis for historical activities. For example, for many activities in Idaho, such as mining and silviculture, it is often necessary to discharge stormwater and other waters long after the commercial activity has occurred. We are concerned that the proposed rule does not properly take this unique situation into account. We have proposed changes to the rule to address these issues.

Finally, we are concerned that many existing discharges which have previously been authorized under federal law (e.g. superfund) or which were not previously regulated by EPA but recent court decisions now require Clean Water Act permits, might be subject to a full antidegradation review. We have suggested changes to the proposed rule to address this issue.

Specific Comments

The following are IACI/IMA's specific comments to the rule in redline/strikeout format.

010. DEFINITIONS.

01. Activity. For purposes of antidegradation review, an activity that causes a discharge to a water subject to the jurisdiction of the Clean Water Act.

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 projects include actions taken under CERCLA, 42 USC § 9601 et seq. and other ~~or~~ state administrative or voluntary orders.

04. Assigned Criteria. ~~In order to conduct an antidegradation review, it must be known what criteria are assigned to protect the water body which may be affected by the proposed activity or discharge. Assigned criteria are those associated with the designated, presumed, and any existing uses from Section 100 of these rules. Criteria associated with the designated and any existing uses from Section 100 of these rules.~~

26. Discharge. When used without qualification, any spilling, leaking, emitting, escaping, leaching, or disposing of a pollutant into the water of the state. For purposes of implementing the antidegradation policy at Section 051, means the addition of a pollutant to a water of the United States from a point source.

18. Degradation or Lower Water Quality. For purposes of antidegradation, degradation or lower water quality means a significant change in concentration of a pollutant that is measurable and adverse to beneficial uses of the water, as calculated at the edge of the mixing zone.

35. Existing Activity or Discharge. An activity or discharge that has been previously authorized under state or federal law or a discharge for which the applicable federal agencies did not previously require a permit or license.

49. Impairment.

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

i. For aquatic life uses, non-compliance with those levels of water quality criteria listed in Sections 200, 210, 250 and 275 (as applicable), unless the Department determines based on available data that no two or more major biological groups such as fish, macroinvertebrates, or algae necessary to support the fishery 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

b. The Department ~~shall~~ may utilize the current version of the “Water Body Assessment Guidance” as published by the IDEQ, as a guide in making impairment decisions.

65. New Activity or Discharge. An activity or discharge that has not been previously authorized. Existing activities or discharges for which EPA, the Corps of Engineers or FERC had required a permit or license and which are not currently permitted, or licensed or granted an authorization, will be presumed to be new unless the Director determines to the contrary based on review of available evidence.

75. Permit or License. A permit for a discharge to waters of the United States or license for an activity that is subject to certification by the state under Section 401 of the Clean Water Act, including, ~~for example,~~ NPDES permits, dredge and fill permits, and FERC licenses.

~~76. License.~~

051.06 Discharges and Activities. Idaho’s antidegradation policy only applies to discharges and activities subject to a permit or license.

052. IMPLEMENTATION.

04. General Permits. For general permits issued on or after July 1, 2011, the Department will conduct antidegradation review, including any required Tier II analysis, at the time at which general permits are certified. For 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. For general permits that the Department determines do not adequately address antidegradation, the Department may conclude that other conditions, such as the submittal of additional information or individual certification at the time an application is submitted for coverage under a general permit, may

be necessary in the general permit to provide reasonable assurance of compliance with the antidegradation policy. The Department will presume that general permits issued by EPA and the U.S. Army Corps of Engineers impose the least degrading reasonable alternative to minimize degradation consistent with 052.09.c. of these rules. If supported by the permit record, the Department may also presume that discharges authorized under a general permit are insignificant.

06. Identification of Tier I and Tier 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 supporting assessed uses will be provided Tier II protection.

c. Water bodies identified in the Integrated Report including water bodies designated as special resource waters as not supporting an assessed use will receive protection 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 unless there is biological data (as defined in Section 01.49) showing no impairment; ~~or~~

~~(2) No impairment,~~ then the water body shall receive Tier II protection for aquatic life once the water body is removed from an impaired status in the Integrated Report; ~~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.~~

07. Tier I Review. Tier I review will be performed for all new or reissued permits or licenses. Existing uses and the water quality necessary to protect the existing uses must always be maintained and protected. No degradation or lowering of water quality may be allowed that would cause or contribute to violation of water quality criteria as calculated after appropriate mixing of the discharge and receiving water.

Also, it appears that 07.a. and 07.b. are redundant and unnecessary, and we therefore recommend they be deleted.

08. Evaluation of Effect of an Activity or Discharge on Water Quality. The Department will evaluate the effect on water quality for each ~~parameter of concern~~ pollutant. The Department will determine whether an activity or discharge results in an improvement, no change, or degradation of water quality.

a. Effect on water quality will be based on the calculated change in concentration in the receiving water as a result of a new or reissued permit or license. With respect to a discharge, this calculation will take into account dilution using appropriate mixing of the receiving water ~~under critical conditions coupled with the design flow of the discharge~~. For a reissued permit or license, the calculated change will be the difference in water quality that would result from the activity or discharge as authorized in the current permit or license or other authorization and the water quality that would result from the activity or discharge as proposed in the reissued permit or license. For a new permit or license, the calculated change will be the difference between the existing receiving water quality and water quality that would result from the activity or discharge as proposed in the new permit or license.

iii. **New Permit Limits for an Existing Discharge.** When new permit limits are proposed for the first time for a parameter of concern pollutant in an existing discharge, then for purposes of calculating the change in water quality, the Department shall determine whether the proposed permit will result in any increase in the discharge of a pollutant above what has pollutant had been discharged in the past. The Department will use any statistical procedures used to derive the proposed new limits will be applied to the current discharge quality as well, where appropriate.

c. **Offsets.** In determining the effect of an activity or discharge on water quality of Tier II or Tier III waters, the Department may take into account reductions in pollution from other sources ~~that are tied to the proposed activity or discharge~~. These offsets in pollution must be within the same water body as the upstream of the degradation in water quality due to the proposed activity or discharge and occur before the activity or discharge is allowed to begin. The applicant seeking a permit or license for an activity or discharge based on offsets will be held responsible for assuring offsets are achieved and maintained ~~as a condition of their permit or license~~.

e. **Mixing Zone.** Mixing Zones will be provided in accordance with Section 060.

09. Tier II Analysis. A Tier II analysis will only be conducted for activities or discharges, subject to permit or a license, that cause significant degradation. The Department may allow significant degradation of surface water quality that is better than assigned criteria only if it is determined to be necessary to accommodate important economic or social development in the area in which the waters are located. The process and standard for this determination are set forth below.

a. **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 shall determine

~~that whether~~ 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 052.09.d., shall be required.

i. ~~In no case will the Department determine insignificant discharges are those which when the proposed change in assigned criteria discharge, from conditions as of July 1, 2011, and which will:~~

(1) Increase ambient concentrations by more than ten percent (10%) as calculated at the edge of the mixing zone; ~~or~~

~~(2) Cumulatively decrease assimilative capacity by no more than ten percent (10%).~~

b. **Other Source Controls.** In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the waterbody watershed the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for nonpoint source controls. In providing such assurance, the Department may enter together into an agreement with other State of Idaho or federal agencies in accordance with Sections 67-2326 through 67-2333, Idaho Code.

c. Alternatives Analysis~~Degradation Deemed Necessary.~~ ~~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 ~~shall~~ may be followed:

d. **Socioeconomic Justification.** Degradation of water quality deemed necessary must also be determined by the Department to accommodate important economic or social development. In evaluating socioeconomic justification, the Department shall consider the overall economic effect of the proposed discharge or activity including past economic and social development as well as the reasonable costs to protect the beneficial uses of the water body. 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~~ may use the following steps to demonstrate this:

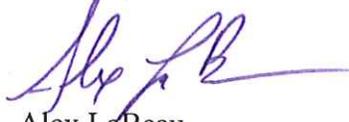
e. **Process.**

iii. **Public Involvement.** The Department will satisfy the public participation provisions of Idaho's continuing planning process ~~and, to the extent possible,;~~ Public notice and review of antidegradation will be coordinated with existing 401 certification notices for public review.

Paula J. Wilson
October 1, 2010
Page 8

Thank you for the opportunity to comment on the proposed rule. IACI/IMA will closely monitor this rule when it is submitted to the Board and the Idaho Legislature for approval.

Sincerely,



Alex LaBeau
IACI President



Jack Lyman
IMA Executive Director