



July 3, 2015

**Paula Wilson, Idaho Department of Environmental Quality**

1410 N. Hilton

Boise, ID 83706

RE: IDAPA 58 – Department of Environmental Quality. 58.01.11 – Groundwater Quality Rule. Docket No. 58-0111-1501.

Dear Ms. Wilson,

The Greater Yellowstone Coalition (GYC) appreciates the opportunity to provide comments on revisions to IDAPA 58.01.11 Groundwater Quality Rule in regards to degradation of ground water caused by mining activities. For over 30 years, the Greater Yellowstone Coalition has worked to protect the lands, waters and wildlife of the Greater Yellowstone Ecosystem (GYE) including southeast Idaho. The GYE and the State of Idaho enjoy some of the cleanest, coldest waters in the Lower 48 that supports healthy fisheries of native trout. A significant threat to these waters includes the leaching of selenium due to phosphate mining. It's critical that the State of Idaho protects the ground and surface waters not only for the fishery, but more importantly for present and future generations of Idahoans to enjoy.

Please consider the following comments in regards to the revisions to the Groundwater Quality Rule (IDAPA 58.01.11). If you have any questions or comments, please feel free to contact me. Thank you in advance for your consideration.

Sincerely,

*Kathryn M. Rinaldi*

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### **Rulemaking Process**

The Greater Yellowstone Coalition is concerned with how the rule change was made and believes that negotiated rulemaking would have resulted in a better outcome. In fact, the Greater Yellowstone Coalition believes the Temporary Rule Making implemented through an administrative process does **less** to protect the public health, safety and welfare. Negotiated rulemaking would have allowed all interested parties and the agencies to seek consensus. It is not clear why Negotiated Rulemaking was not feasible for these rule changes. There is an appearance that these changes were made at the behest of unidentified proponents with potential to degrade groundwater resources and with a goal of limited public input and consideration for the public's health, safety and welfare.

In general, the changes proposed include language that is vague and subjective. It would seem that a principal objective of a rule change would be to increase clarity and specificity. It is unclear how phrases such as "maximum extent practical" and "shall" will be interpreted and implemented. In addition, the Greater Yellowstone Coalition is concerned with how the language that was added regarding a Point of Compliance will be used to adequately protect groundwater quality.

**Recommendation:** Do not adopt the Temporary Rule and initiate a new review of the proposed rule using Negotiated Rule Making.

### **150.02 Aquifer Categorization**

#### **Table 1. Level of Protection and Application of Standards to Aquifer Categories**

The language added under the column "Level of Protection" for the "General Resource" and "Other Resource" that now includes "to the maximum extent practical" appears to change the level of protection and is open to subjectivity and uncertainty on how "maximum extent practical" will be defined and implemented. The word **practical** can be interpreted to mean anything from "convenient" to "useful". Practical can also be interpreted to mean what is *practiced*, which does little for applying innovative methods for protecting Idaho's aquifers. The change in language to include "to the maximum extent practical" appears to question the accepted best management practices (bmp) and instead allows the polluter to decide what his/her level of practical protection will be. A standard should be set to allow the Idaho Department of Environmental Quality full capacity to insure maximum resource protection and allow only the minimum degradation necessary.

**Recommendation:** Strike the addition of the language "to the maximum extent practical," which creates uncertainty and subjectivity in the rule.

**Recommendation:** Amend the language to "to the maximum extent *possible*," which creates more certainty, allows for innovation and establishes intent for achievability and minimal interpretation.

### **303. Management of Activities with the Potential to Degrade Aquifers**

**01.a, 02.a and 03.a that adds the language "except when a point of compliance is set pursuant to Section 401."**

**400. Ground Water Contamination, 02.a. adding the language "except when a point of compliance is set pursuant to Section 401".**

The Greater Yellowstone Coalition Comments RE: Department of Environmental Quality  
Groundwater Quality Rule Change (IDAPA 58.01.011)

This addition of the language “except when a point of compliance is set pursuant to Section 401” assumes that if a point of compliance is set, degradation of a sensitive resource, general resource and other resource aquifers can occur and is acceptable. This essentially will place the burden of water quality protection on the agency’s ability to write and enforce a permit, which we recognize is currently a challenge for DEQ. Essentially, this language addition infers that a polluter does not have to maintain or improve existing groundwater quality. The DEQ currently has the ability to set Points of Compliance that reasonably protect human health.

**Recommendation:** Reject and strike the addition of “except when a point of compliance is set pursuant to Section 401” for all sections.

**401. Mining, 01. Request for Setting Point(s) of Compliance and Standards Applicable to Mining Activities**

In general, the Greater Yellowstone Coalition is concerned that the changes in this section have made the overall rule for groundwater quality weaker. The operative change from “must” to “shall” is disconcerting. Bryan Garner, the legal writing scholar and editor of Black’s Law Dictionary wrote that “in most legal instruments, *shall* violates the presumption of consistency...which is why *shall* is among the most heavily litigated words in the English language.” Rule changes must provide more clarity and consistency, not encourage litigation and ambiguity. The word *must* compels a legal obligation and validly expresses “mandatory”. It is reasonable for the Greater Yellowstone Coalition to assume there was intent for changing “must” to “shall” and therefore making the protection of “current and projected future beneficial uses of the ground water” optional. Additionally, the striking of “Mining activities *must* [emphasis added] be managed using the level of protection appropriate for the aquifer category in accordance with Subsection 150.02 and Section 301” further weakens the rule. This is not good law for Idaho and creates uncertainty and vulnerability for current and future generations of Idahoans.

The addition of “Degradation of ground water is allowed at a point of compliance if the mine operator implements the level of protection during mining activities appropriate for the aquifer category as specific in Table 1 of Subsection 150.02” speaks to our overall concern that this infers it is acceptable for the polluter to continue to degrade groundwater when a point of compliance is set and places the burden not on the polluter, but on the DEQ.

Finally, although we recognize the intent of the Legislature with House Bill No. 197 was to make IDAPA 58.01.11-Groundwater Quality Rule clear, concise and consistent, in fact we believe these changes will make the rule weaker, ambiguous and are ripe for legal challenge. Words such as “shall” and “extent practical” have several possible meanings and lack clearness or definiteness, which is not good for stakeholders or businesses. Good rules and laws provide for little interpretation. We recommend the DEQ reject these proposed changes and if there is clear reason to amend IDAPA 58.01.11., then the DEQ should engage in Negotiated Rule Making.