



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

September 13, 2013

Paula Wilson
Idaho Dept. of Environmental Quality
1410 North Hilton
Boise, ID 83706

Dear Ms. Wilson:

The Idaho Department of Environmental Quality (the Department) is seeking comments on changes to IDAPA 58.01.02.052.08.a. This proposed change to the antidegradation section of Idaho's water quality rule is in response to the July 23, 2013 disapproval of the same by the Environmental Protection Agency (EPA). The EPA originally approved 58.01.02.052 in August 2011. The Greater Yellowstone Coalition, though not a participant in the development of the water quality antidegradation rules, filed a complaint in federal district court challenging two aspects of Idaho's antidegradation rule: the definition of antidegradation and the *de minimis* provision. Judge Winmill ruled in favor of the Defendant and Defendant-Intervenors regarding the definition of antidegradation. EPA asked the court to remand the *de minimis* provision for further examination. EPA subsequently reversed its prior approval of the *de minimis* provision.

The Idaho Association of Commerce & Industry (IACI) is the leading voice for business on environmental matters in Idaho. IACI was a Defendant-Intervenor in the complaint filed by the Greater Yellowstone Coalition. IACI was also extensively involved in the development of the legislation, rulemaking and guidance associated with the antidegradation portion of the water quality rules developed in 2010 and 2011.

We are pleased that the Department determined not to adopt provisions of the Great Lakes Rule related to bio-accumulative toxins, as IACI does not believe that such an approach is defensible in Idaho. IACI does support the proposed changes to 58.01.02.052.08.a. These changes are consistent with EPA guidance on Tier II Antidegradation Reviews and Significance Thresholds.¹ In this guidance, EPA acknowledges the flexibility that states have in regards to this matter:

"EPA has afforded the states and tribes some discretion in determining what constitutes a significant lowering of water quality. EPA has accepted a range of approaches to defining a significance threshold over which a full antidegradation review is required."

The guidance memo from EPA provides some framework as for what is "significant" — it defines a numerical value for significance and then discusses how that value is to be used.

¹ EPA. 2005. Tier 2 Antidegradation Reviews and Significance Thresholds.

“EPA has accepted a range of approaches to defining a significance threshold over which a full antidegradation review is required. This issue was considered at great length in the process of developing the Water Quality Guidance for the Great Lakes. Relying on input offered during a four-year open public process involving environmental groups, industry representatives, and other experts, with numerous opportunities for public input, the directors of the eight Great Lake states and EPA technical experts reached a consensus on a significance threshold value of ten percent (10%) of the available assimilative capacity, coupled with a cumulative cap.”

The proposed rule change provides the state of Idaho the opportunity to evaluate each proposed change in water quality and determine whether the technical information justifies a determination of insignificance. IACI believes that this is a preferred approach instead of adopting the provisions of the Great Lakes Initiative (GLI). As described in the enclosed document (which IACI incorporates as comments), the technical basis for the GLI is not applicable to Idaho waters. The proposed rule provides a cap of 10% of change in cumulative assimilative capacity. Thus, the proposed rule is consistent with the EPA guidance.

We would appreciate learning how the Department intends to address the exercise of discretion in implementing the *de minimis* provision in the *Idaho Antidegradation Implementation Procedures*. IACI is very interested in working with the Department on updating the Procedures.

Besides changes in the Rules in regards to antidegradation, the Department has also proposed rule changes related to TMDLs (055. Water Quality Limited Waters and TMDLs). IACI generally supports the proposed rule changes and has proposed some minor changes to the Rule in redline format, which are enclosed. Additionally, we are concerned that IDEQ's proposed changes may inadvertently diminish the ability to list impaired waters as Category 4(b) waters in the state's Integrated Report. Accordingly, we also recommend that language be added to support the Category 4(b) process. Specifically, we recommend the following language in 055.02:

- a. TMDLs do not need to be developed for water bodies where the use impairment is being addressed by other pollution control requirements. Such waters shall be identified as Category 4(b) waters in the Integrated Report.

We appreciate the opportunity to comment on the proposed rule and the work the Department has done over the past several years in developing the water quality antidegradation program.

Sincerely,



Alex LaBeau
President

enclosures (2)

cc: Alan Prouty, Chairman
IACI Environment Committee



June 21, 2013

Opalski.dan@epamail.epa.gov

Dan Opalski
U.S. Environmental Protection Agency
1200 Sixth Ave, Suite 900, OWW-135
Seattle, WA 98101

Chung.angela@epamail.epa.gov

Angela Chung
U.S. Environmental Protection Agency
1200 Sixth Ave, Suite 900, OWW-131
Seattle, WA 98101

**Re: Voluntary Remand of De Minimis Exemption
Greater Yellowstone Coalition v. EPA (D. Idaho)
Case No. 4:14-CV-60-BLW**

Dear Mr. Opalski and Ms. Chung:

The Idaho Association of Commerce & Industry ("IACI") is a party to the subject action. We appreciate the opportunity to comment on EPA's Voluntary Remand of the de minimis exemption to Idaho's Anti-degradation Implementation Rule ("Idaho's Rule") which was granted by the Court on April 24, 2013 in the subject action.

IACI, like EPA, was actively involved in the rule-making process which resulted in promulgation of Idaho's Rule, codification of Idaho's Rule by the Idaho Legislature and approval of Idaho's Rule by EPA. IACI provided technical, regulatory and policy input on all of the major issues discussed during the rule-making. While we are not sure what EPA is considering on the Voluntary Remand we believe EPA should confine its review to the issues raised by the commenting parties during the rule-making process. Accordingly, IACI makes the following comments:

1. Options for EPA.

Based on the Administrative Record ("AR") supporting Idaho's Anti-Degradation Rule-Making and the pleadings filed in the subject action, EPA has two choices on the Voluntary Remand: 1) EPA can inform the Court that the agency is not taking a new action; or 2) EPA can disapprove Idaho's de minimis provision because the Idaho Department of Environmental Quality ("IDEQ") did not retain any discretion on a case by case basis to require anti-degradation review for de minimis discharges into high quality waters that IDEQ otherwise deems

significant. These were the only issues raised during the rule-making process and in GYC's Complaint that are relevant to EPA's Voluntary Remand.

If EPA were considering an outright exclusion of bioaccumulative pollutant (however that term is defined) discharges from the de minimis provision in Idaho's Rule, that issue was never raised by GYC or EPA during the lengthy rule-making process. Indeed the first time the issue of bioaccumulative pollutants ("BCCs") was raised was in GYC's summary judgment brief. Thus the issue has been waived and should not be an option considered by EPA on the Voluntary Remand. *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F3d 1009, 1023 (9th Cir. 2007) (A court will not review challenges to agency action for the first time on appeal). The purpose behind the waiver rule is to permit administrative agencies to utilize their expertise, correct any mistakes and avoid any unnecessary judicial intervention in the administrative process. *Lands Council v. McNair*, 629 F.3d 1070 (9th Cir. 2010).

There was scant discussion on BCCs during the rule-making. Neither EPA or IDEQ ever articulated a legal, technical or factual basis to exclude BCCs from the de minimis provision in Idaho's Rule. Therefore this issue should not be considered as a possible option on Voluntary Remand. Even if EPA disagrees with IACI on this point, as set forth below, there is no factual, technical or legal basis for EPA to require Idaho to adopt a BCCs exclusion to Idaho's de minimis provision.

2. EPA Should Stand by Its Original Decision.

There is no reason in the record to suggest that EPA should reconsider its decision on August 18, 2011 approving Idaho's de minimis provision. In fact, there are compelling reasons why EPA should stick to its original decision.

First, Idaho's de minimis provision is consistent with the requirements of the Clean Water Act, prior EPA decisions on other state anti-degradation implementation procedures, and EPA guidance and judicial decisions.

There is no requirement under the Clean Water Act which requires that states retain discretion on a case by case basis to exclude certain discharges from a de minimis exemption. For example, EPA's key guidance on insignificant discharges does not require or suggest that each state must retain discretion to apply its de minimis provision on a case by case basis. *See* AR 000908, Epham King, Tier 2 Antidegradation Reviews and Significance Thresholds (EPA, August 20, 2005) ("King Memo"). IDEQ carefully applied the requirements articulated in the King Memo in adopting Idaho's de minimis provision.

Further, consistent with EPA guidance, EPA has approved other state standards in the past that were nearly identical to Idaho's de minimis provision. *See* State of New Mexico Antidegradation Policy Implementation Procedure (December 2004), Wyoming Implementation

Policies for Antidegradation and Kentucky's Antidegradation Implementation Procedures at 401 KY ADC 10:030.¹

Finally, judicial decisions have upheld EPA approvals of de minimis provisions nearly identical to Idaho's Rule. *See Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466 (6th Cir. 2008) (Kentucky's de minimis provision based on assimilative capacity upheld as consistent with the Clean Water Act). *See also Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp 2d 732 (S.D. W.V. 2003) (West Virginia's de minimis provision upheld). We are not aware of any change in the law, judicial decisions or EPA rules that would now require EPA to mandate that Idaho must retain its discretion to require certain otherwise de minimis discharges to be subject to a full anti-degradation review.

During the rule-making, IACI provided comments on the de minimis issue and advocated that IDEQ retain no discretion because de minimis discharges were by definition insignificant. *See AR 001399-001406*. EPA and GYC said nothing on this issue. Ultimately, IDEQ, the Idaho Board of Environmental Quality and the Idaho Legislature agreed with IACI's position. There is no justification for EPA to now second guess those decisions based on no technical or legal basis.

We recognize that the final Great Lakes Initiative (GLI) promulgated by EPA at 40 CFR Part 132 might be read to allow Great Lakes States the discretion on a case by case basis to require antidegradation review for non BCCs de minimis discharges. *See 40 CFR, Part 132, Appendix E*.

However, the fact that the GLI may have allowed discretion to Great Lakes States to require anti-degradation reviews for de minimis discharges is not relevant to EPA's review of Idaho's Rule on the Voluntary Remand. IACI acknowledges that EPA filed the GLI as part of the AR in the subject action. This filing came as a surprise to IACI since there was little or no discussion from EPA or any other of the various stakeholders during the Idaho Rule-making that even suggested that use of the GLI anti-degradation procedures were appropriate for Idaho. Certainly there was never any suggestion by EPA that the GLI procedures were mandatory in Idaho.

It is clear from the GLI record that the Initiative was promulgated in direct response to the unique characteristics of the Great Lakes and in response to a specific directive from Congress. *See 33 USC § 1268*. EPA was directed by Congress to achieve the goals of the Great Lakes Water Quality Agreement of 1978 with particular emphasis on goals related to toxic pollutants. 33 USC § 1268(a)(1)(B). Thus the regulatory requirements for the Great Lakes water goals are different than other states like Idaho.

¹ Examples of additional states with de minimis provisions that do not exclude BCCs include Nevada, Washington, New Mexico and Tennessee.

During the GLI rule-making, EPA also found that the Great Lakes were physically unique which warranted developing a unique set of rules for the Great Lakes states especially relating to BCCs. As EPA noted:

“These persistent bioaccumulative toxic chemicals are of particular importance to the Great Lakes Basin Ecosystem due to the long retention times of the individual lakes and the cycling of toxics from one component of the ecosystem to another.

Several characteristics of the Great Lakes result in their being particularly susceptible to relatively nondegradable, lipophilic chemicals. These characteristics include: (1) Long hydraulic retention times (relatively closed systems); (2) low biological productivity; (3) low suspended solids concentrations; (4) great depth; and (5) the presence of self-contained fish and wildlife populations dependent on the Great Lakes System for their water and food supply.”

See AR 000059; 58 FR 20808 (April 16, 1993).

Also during the rule-making EPA recognized that the Great Lakes Water Quality Agreement (which Congress directed EPA to follow) required a particular emphasis on BCCs. EPA noted:

“The proposal to establish additional controls on chemicals with a BAF over 1000 ensures that all pollutants with both properties persistence and bioaccumulation, will be controlled.

EPA believes the selection of BCCs for special attention in the Guidance is in conformance with the Great Lakes Water Quality Agreement, which calls for a focus on persistent toxic pollutants. Article II of the Agreement states that it is the policy of the parties to the Agreement that the discharge of any or all persistent toxic substances be virtually eliminated, where persistent toxic substances are defined in Annex 12 of the Agreement as any toxic substance with a half-life in water of greater than eight weeks. As discussed above, the Technical Work Group was unable to develop systematic quantitative information, including overall half lives, on persistence in the Great Lakes Basin Ecosystem.”

See AR 000072; 58 FR 20821 (April 16, 1993).

With respect to the anti degradation procedures and addressing BCCs during the anti degradation process EPA noted:

“Because of the long retention time and the complex flow patterns of the water in the Great Lakes System, the Lakes tend to act as a sink, accumulating pollutants discharged to them. There is an identified problem in the Great Lakes associated with substances that are highly bioaccumulative in the tissues of aquatic organisms. Contamination by such substances has resulted in State-imposed fish consumption advisories and restrictions for humans, and has been implicated in a variety of adverse biological effects, such as impaired reproductive success and deformities, among aquatic organisms and the wildlife that consumes them. A special emphasis is made in the proposed Guidance to restrict increases in the rate of loading of highly bioaccumulative chemicals.”

See AR 000138; 58 FR 20887 (April 16, 1993).

Further, during the GLI rule-making, EPA made clear that the GLI was not intended to set a national standard for state water quality standards throughout the United States. As EPA noted:

3. Final Guidance. The final Guidance contains no mandatory requirements for discharges outside the Great Lakes system.

EPA would like to reemphasize that the provisions in the proposed and final Guidance are expressly applicable only to the waters of the Great Lakes System. EPA has initiated no rulemaking action to extend any Guidance provisions beyond the Great Lakes System. EPA’s request for comments in the proposal was soliciting views only on whether any future national guidance or rulemaking affecting water programs beyond the Great Lakes System should include any concepts contained in the final Guidance.

States or Tribes with waters outside the Great Lakes System, in whole or in part, are encouraged to implement any of the Guidance methodologies or procedures that are scientifically and technically appropriate for their situations. This would include any Great Lakes States or Tribes that may choose to apply some or all of the Guidance in portions of their jurisdictions outside the Great Lakes System. Some Great Lakes States indicated their intention to do so in their written comments on the proposed Guidance.

See AR 000426. Water Quality Guidance for the Great Lakes System – Supplementary Information Document.

The fact that the GLI was not intended as a national mandate was particularly true for the GLI procedures regulating BCCs. *See* AR 000425 (“For example, the special provisions for BCCs may not be appropriate in systems not having the long retention times and other chemical and physical characteristics of the Great Lakes System”).

There is nothing in the AR to suggest that the conditions within Idaho waters are similar to the Great Lakes. In fact, just the opposite is the case. Almost all of Idaho waters are flowing waters (often fast flowing waters) with little or no retention time. While Idaho does have a few larger lakes and one or two large reservoirs, there is nothing in the record to suggest that these few large lakes and reservoirs are similar to the conditions of the Great Lakes. Further there is no support in the record for the idea that all state waters must be subject to the GLI. Thus we do not believe the GLI provides the basis for EPA to conclude that IDEQ must retain discretion on a case by case basis in its anti-degradation implementation procedures to require anti-degradation review for discharges that are otherwise insignificant. The case law supports IACI on this point. *See Ohio Valley Environmental Coalition v. Horinko, supra* (the Great Lakes Initiative anti-degradation procedures are not appropriate for non-Great Lakes states such as West Virginia).

Finally, IACI believes there are strong public policy reasons for EPA to stick by its original decision of August 18, 2011. First of all IACI believes that public agencies should defend their decisions unless there is compelling legal or technical reasons to suggest the decision was in error. Otherwise, an agency’s decision-making cannot be relied upon. As noted herein, there are no compelling reasons or legal mandates to suggest EPA’s original decision was erroneous. EPA participated in every rule-making meeting DEQ held in this matter and did not raise any issues about Idaho’s de minimis provisions. Further, EPA management informed the Idaho Board of Environmental Quality that the Rule was approvable. There is no technical or legal justification for EPA to reconsider its original decision.

Secondly, it would make a mockery of the public rule-making process which IDEQ and EPA supports to now make a decision behind closed doors that Idaho’s Rule is deficient. IACI, unlike GYC and EPA, did raise an issue related to Idaho’s de minimis provision during the rule-making. IACI requested that IDEQ remove its discretion to require certain insignificant

discharges to undergo a full anti-degradation review. AR 001399-001406. IACI's main concern with this provision was that IDEQ's discretion was unfettered. The provision did not identify what standards or criteria IDEQ might apply in exercising discretion with respect to de minimis discharges. Thus IACI requested it be deleted from Idaho's Rule. The Idaho Board of Environmental Quality and the Idaho Legislature agreed. Again EPA never raised an objection with these decisions. It would be inappropriate for EPA to now mandate that Idaho must retain unfettered discretion to determine whether a de minimis discharge requires a full anti-degradation review. The regulated community deserves and has the right to more certainty. IACI openly and actively participated in the anti-degradation rule-making. IACI remains willing to thoroughly evaluate what conditions, if any, might allow IDEQ to determine that certain de minimis discharge might require a full anti-degradation review. However, IACI does not believe under the current record that such unfettered discretion is supportable and therefore urges EPA to affirm its original decision.

Finally, the de minimis provision in Idaho's rule is ultimately about focusing limited state resources to discharges that have environmental effects. That is the point of the de minimis provision. EPA's own guidance and federal case law recognizes the justification of having de minimis provisions. King Memo and *Kentucky Waterways Alliance v. Johnson, supra*. As you may be aware, the Idaho Legislature establishes appropriations to IDEQ depending upon state priorities and available resources. The Idaho Legislature determined that they did not want IDEQ allocating resources to insignificant discharges. See Idaho Code § 39-3606(2)(c). It would be wholly inappropriate for EPA to now second guess the Idaho Legislature on how IDEQ should be devoting their resources, absent any evidence in the record to support such a need. IACI is unaware of any evidence that would suggest Idaho's de minimis provision approved by EPA is causing any environmental problems. Absent such evidence, EPA should not second guess the appropriation and resource priorities of the Idaho Legislature or EPA's original decision.

3. EPA Should Not Mandate that Idaho Must Adopt a BCC Exclusion in its Deminimis Provision.

As noted above, IACI believes it is inappropriate for EPA to mandate that Idaho must adopt a BCCs exclusion in its de minimis provision identical or similar to the GLI because that issue was never raised by GYC or EPA during the rule-making and is therefore waived. Even if EPA does consider a BCCs exclusion, there is no support in the record for such a categorical exclusion throughout Idaho, and therefore such a decision would be arbitrary and capricious and not in accordance with the law.

As noted above, there was scant discussion about a BCCs exclusion during the rule-making process. IDEQ originally proposed a BCCs exclusion in its de minimis provision in the first preliminary draft negotiated rule similar to the GLI. See AR 001414-001416. In that preliminary proposal IDEQ also proposed excluding all industrial discharges and major municipalities from the de minimis provisions. *Id.* Early on in the process IACI objected to these provisions because there was no technical, legal or factual basis for such categorical

exclusions in Idaho. (An insignificant discharge is de minimis no matter who is discharging or what is being discharged). *See* AR 001566-001584. IDEQ agreed with IACI's and other commenter's on these issues and deleted these exclusions. *See* AR 001486-001490. The fact that these exclusions were in Idaho's draft proposal through Draft No. 4 is of no moment because of the way the rule-making process proceeded. IDEQ's original preliminary draft on a variety of issues remained the same until the rule-making committee actually took up a specific topic. Idaho's de minimis provision was not discussed until after Draft No. 4 was circulated. During the public meeting discussing the de minimis provision, IACI and other participants questioned the need for a categorical BCCs exclusion in Idaho's de minimis provision. Nobody in the rule-making meetings, including IDEQ, EPA or GYC could articulate a technical or legal justification to retain the BCCs exclusion and it was therefore deleted in the next draft. Thereafter no commenting parties, including GYC, EPA or any other group objected to deleting the BCCs exclusion or articulated a legal or technical basis for retaining the BCCs exclusion. As noted above it would be inappropriate for EPA to now decide behind closed doors that the BCCs exclusion is mandated in Idaho.

Further we do not believe the GLI provides the legal justification to mandate the BCCs exclusion in Idaho's de minimis provision. Based on the GLI record it was clear that BCCs received substantial attention and warranted special treatment. This was so for a number of reasons. First there was substantive information in the GLI record that BCCs had already accumulated in the Great Lakes at unsafe levels. Secondly, due to the unique characteristics of the Great Lakes which included significant retention times that made it more likely that BCCs once discharged would remain in the Great Lakes. Finally, the Great Lakes Agreement of 1978, which Congress directed EPA to follow, mandated the elimination of BCCs. *See* AR 000072 and 33 USC § 1218(a)(1)(B). All of these unique factual, technical and regulatory factors associated with the Great Lakes led EPA to regulate BCCs differently.

EPA made clear in GLI record, that the GLI's regulation of BCCs was not intended to establish a new national standard. AR 000426. Rather, EPA noted that non-Great Lakes states had the discretion (but were not required) to adopt some of the GLI procedures if they choose. In fact EPA noted that if the regulations of BCCs in the GLI were to become a minimum standard for state water quality standards EPA would develop a nationwide rule-making or guidance first to justify such mandates. AR 000425 ("Any significant proposed changes affecting national programs would be announced in advance in order to solicit comment from the scientific and technical community, as well as the public at large.")

With respect to requiring that a full anti-degradation review be required for the discharge of any BCCs we are unaware of EPA adopting national guidance or rule-making requiring such a result. Similarly we are unaware of EPA ever disapproving a state anti degradation implementation procedure (outside the Great Lakes) because it did not require a full anti-degradation review for the discharge of any amount of BCCs. In fact, IACI has reviewed numerous anti degradation procedures throughout the west and a requirement for a full anti degradation review for the discharge of any BCCs is for the most part absent in state rules and implementation procedures.

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Angela Chung
June 21, 2013
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Finally, the only judicial case on point specifically rejected the idea that the BCCs provisions in the GLI for anti-degradation implementation procedures are mandated in non-Great Lakes States. *See Ohio Valley Environmental Coalition, supra*. Idaho should not be subject to a different standard than other states on this issue. We are confident that the Court would agree with IACI on this point in the subject action. If EPA decides that all BCCs discharges (however small) must be subject to full anti-degradation review throughout the United States, it should subject such a proposal to notice and comment as it promised to do under the GLI.

Thus, for the foregoing reasons IACI believes the GLI does not support disapproving Idaho's de minimis provision or requires that Idaho must subject any BCCs discharge to full anti degradation review.

Sincerely,



Alex LaBeau
President

cc: Curt Fransen, Director
Idaho Dept. of Environmental Quality

Yellow shaded text indicates revisions made based on discussion held on August 28, 2013 and review of written comments received.

Written comment deadline for this draft – 9/20/13

052. ANTIDegradation IMPLEMENTATION.

The antidegradation policy shall be implemented as follows:

(3-18-11)

(Break in Continuity of Subsections)

08. Tier II Analysis. A Tier II analysis will only be conducted for activities or discharges, subject to a permit or a license, that cause 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.

(3-18-11)

a. Insignificant Degradation. If the Department determines an activity or discharge will cause degradation, then the Department shall determine whether the degradation is insignificant.

i. A cumulative decrease in assimilative capacity of more than ten percent (10%), from conditions as of July 1, 2011, always constitutes significant degradation. If the cumulative decrease in assimilative capacity from conditions as of July 1, 2011 is less than ten percent (10%), then, taking into consideration the size and character of the activity or discharge and the magnitude of its effect on the receiving stream, the Department may determine that the degradation is insignificant.

ii. The Department may request additional information from the applicant, as needed to determine the significance of the degradation.

(3-29-12)

iii. If degradation is determined to be insignificant, then no further Tier II analysis for other source controls (Subsection 052.08.b.), alternatives analysis (Subsection 052.08.c.) or socioeconomic justification (Subsection 052.08.d.) is required.

b. Other Source Controls. In allowing any degradation of high water quality, the Department must assure that there shall be achieved in the watershed the highest statutory and regulatory requirements for all new and existing point sources and cost-effective and reasonable best management practices for all 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.

(3-18-11)

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 shall be followed:

(3-18-11)

i. Controls to avoid or minimize degradation should be considered at the earliest possible stage of project design.

(3-18-11)

ii. Alternatives that must be evaluated as appropriate, are:

(3-18-11)

(1) Relocation or configuration of outfall or diffuser;

(3-18-11)

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- (2) Process changes/improved efficiency that reduces pollutant discharge; (3-18-11)
 - (3) Seasonal discharge to avoid critical time periods for water quality; (3-18-11)
 - (4) Non-discharge alternatives such as land application; and (3-18-11)
 - (5) Offsets to the activity or discharge's effect on water quality. (3-18-11)
- iii. The Department retains the discretion to require the applicant to examine specific alternatives or provide additional information to conduct the analysis. (3-18-11)
- iv. In selecting the preferred alternative the applicant shall: (3-18-11)
- (1) Evaluate economic impacts (total cost effectiveness, incremental cost effectiveness) of all technologically feasible alternatives; (3-18-11)
 - (2) Rank all technologically feasible treatment alternatives by their cost effectiveness at pollutant reduction; (3-18-11)
 - (3) Consider the environmental costs and benefits across media and between pollutants; and (3-18-11)
 - (4) Select the least degrading option or show that a more degrading alternative is justified based on Subsections 052.08.c.iv.(1), 052.08.c.iv.(2), or 052.08.c.iv.(3) above. (3-29-12)
- 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 following steps to demonstrate this: (3-18-11)
- i. Identify the affected community; (3-18-11)
 - ii. Describe the important social or economic development associated with the activity which can include cleanup/restoration of a closed facility; (3-18-11)
 - 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 be analyzed include, but are not limited to: (3-18-11)
 - (1) Economic benefits to the community such as changes in employment, household incomes and tax base; (3-18-11)
 - (2) Provision of necessary services to the community; (3-18-11)
 - (3) Potential health impacts related to the proposed activity; (3-18-11)
 - (4) Impacts to direct and indirect uses associated with high quality water, e.g., fishing, recreation, and tourism; and (3-18-11)
 - (5) Retention of assimilative capacity for future activities or discharges. (3-18-11)
 - 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 (3-18-11)
 - 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. (3-18-11)

e. Process. (3-18-11)

i. Analysis. The Department in cooperation with State of Idaho designated management agencies and/or federal agencies will collect information regarding the other source controls specified in Subsection 052.08.b. The applicant for a new or reissued permit or license is responsible for providing information pertinent to determining significance/insignificance of proposed changes in water quality and completing an alternatives analysis and socioeconomic justification as appropriate and submitting them to the Department for review. (3-29-12)

ii. Departmental review. The Department shall review all pertinent information and, after intergovernmental coordination, public notice and input, make a determination as to whether there is assurance that the other source controls specified in Subsection 052.08.b. shall be achieved, and whether degradation of water quality is necessary to accommodate important economic or social development. (3-29-12)

iii. Public Involvement. The Department will satisfy the public participation provisions of Idaho's continuing planning process. Public notice and review of antidegradation will be coordinated with existing 401 certification notices for public review. (3-18-11)

(Break in Continuity of Sections)

055. WATER QUALITY LIMITED WATERS AND TMDLS.

01. ~~Reporting Water Body Use Support Status. After using the provisions in Section 054, and after consultation with the appropriate basin and watershed advisory groups, the Department shall identify water bodies in the appropriate category in the Integrated Report. The Integrated Report shall be published periodically by the Department in accordance with the applicable provisions of the Clean Water Act and shall be subject to public review and comment prior to submission to EPA for approval. (3-20-97)~~

02. ~~Water Bodies Needing Development of a Total Maximum Daily Load (TMDL). Those water bodies identified in the Integrated Report as not fully supporting designated or existing beneficial uses and not meeting applicable water quality standards despite the application of required pollution controls shall require the development of TMDLs or other equivalent processes, as required under Section 303(d)(1) of the Clean Water Act. Informational TMDLs may be developed for water bodies fully supporting beneficial uses as described under Section 303(d)(3) of the Clean Water Act, however, they will not be subject to the provisions of this Section.~~

03. ~~Priority of TMDL Development. The priority of TMDL development for water quality limited water bodies identified in the Integrated Report shall be determined by the Director depending upon the severity of pollution and the uses of the water body, including those of unique ecological significance. In determining the severity of pollution and the effect on uses, the Director shall apply the factors set forth in Section 39-3609, Idaho Code. In determining the priority of TMDL development, the Director shall follow the priorities set forth in Idaho Code Section 39-3610. Water bodies identified as a high priority through this process will be the first to be targeted for development of a TMDL or equivalent process.~~

04. ~~Protection of Uses Prior to Completion of TMDLs. Prior to the completion of a TMDL or equivalent process for water quality limited water bodies, the Department shall take those actions necessary to ensure that the existing uses of each water body and the level of water quality necessary to protect those uses shall be maintained and protected pursuant to the antidegradation policy and the provisions in Section 39-3610 Idaho Code. Nothing in this section shall be interpreted as requiring best management practices for agricultural operations which are not adopted on a voluntary basis.~~

05. ~~Consistency with TMDLs. Once a TMDL or equivalent process is completed, discharges of causative pollutants shall be consistent with the load and wasteload allocations in the TMDL. Nothing in this section shall be interpreted as requiring best management practices for agricultural operations which are not adopted on a voluntary basis.~~

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- a. Identification of significant sources of pollution affecting the water body by past and present activities; . (3-20-97)¶
- b. Determination of whether the application of required or cost-effective interim pollution control strategies to the identified sources of pollution would restore the water body to full support status within a reasonable period of time; . (3-20-97)¶
- c. Consultation with appropriate basin and watershed advisory groups, designated agencies and landowners to determine the feasibility of, and assurance that required or cost-effective interim pollution control strategies can be effectively ... [1]
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(3-20-97)

06. Pollutant Trading. Development of TMDLs or equivalent processes or interim changes under these rules may include pollutant trading with the goal of restoring water quality limited water bodies to compliance with water quality standards. (3-20-97)

07. Idaho Agriculture Pollution Abatement Plan. Use of best management practices by agricultural activities is strongly encouraged in high, medium and low priority watersheds. The Idaho Agriculture Pollution Abatement Plan is the source for best management practices for the control of nonpoint sources of pollution for agriculture. (3-20-97)

Deleted: a. In determining the necessity for interim changes to existing activities and limitations upon proposed activities, the Department, in consultation with basin and watershed advisory groups, shall evaluate the water quality impacts caused by past regulated and unregulated activities in the affected watershed. (3-20-97)¶

¶ b. Consideration of interim changes shall maximize the use of cost-effective and timely measures to ensure no further impairment of designated or existing uses.

determining that a water body does not fully support designated or existing beneficial uses in accordance with Section 054, the Department, in consultation with the applicable basin and watershed advisory groups, shall evaluate whether the application of required pollution controls to sources of pollution affecting the impaired water body would restore the water body to full support status. This evaluation may include the following: (3-18-11)

a. Identification of significant sources of pollution affecting the water body by past and present activities; (3-20-97)

b. Determination of whether the application of required or cost-effective interim pollution control strategies to the identified sources of pollution would restore the water body to full support status within a reasonable period of time; (3-20-97)

c. Consultation with appropriate basin and watershed advisory groups, designated agencies and landowners to determine the feasibility of, and assurance that required or cost-effective interim pollution control strategies can be effectively applied to the sources of pollution to achieve full support status within a reasonable period of time; (3-20-97)

d. If pollution control strategies are applied as set forth in this Section, the Department shall subsequently monitor the water body to determine whether application of such pollution controls were successful in restoring the water body to full support status.

After following the process identified in Subsection 055.01,

shall be identified by the Department as water quality limited water bodies, and

A list of water quality limited water bodies shall be published periodically by the Department in accordance with Section 303(d) of the Clean Water Act and be subject to public review prior to submission to EPA for approval.

in consultation with the Basin Advisory Groups as described in Sections 39-3601, et seq., Idaho Code,

High Priority Provisions. Until a TMDL or equivalent process is completed for a high priority water quality limited water body, new or increased discharge of pollutants which have caused the water quality limited listing may be allowed if interim changes, such as pollutant trading, or some other approach for the pollutant(s) of concern are implemented and the total load remains constant or decreases within the watershed. Interim changes shall maximize the use of cost effective measures to cap or decrease controllable human-caused discharges from point and nonpoint sources. Once the TMDL or equivalent process is completed, any new or increased discharge of causative pollutants will be allowed only if consistent with the approved TMDL.

the antidegradation policy and the provisions in Section 39-3610, Idaho Code,

Medium and Low Priority Provisions. Until TMDLs or equivalent processes are developed for water quality limited water bodies identified as medium or low priority, the Department shall require interim changes in permitted discharges from point sources and best management practices for nonpoint sources deemed necessary to prohibit further impairment of the designated or existing beneficial uses.