



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

OFFICE OF  
WATER AND  
WATERSHEDS

SEP 26 2014

Mr. Barry N. Burnell  
Water Quality Division Administrator  
Idaho Department of Environmental Quality  
1410 North Hilton  
Boise, Idaho 83706-1255

Re: Water Quality Standards Revisions (Idaho Dockets 58-0102-1103 and 58-0102-1301)

Dear Mr. Burnell:

Pursuant to section 303(c) of the Clean Water Act (CWA) and 40 CFR Part 131, the U.S. Environmental Protection Agency approves certain revisions to the antidegradation provisions of Idaho statute and water quality standards rule submitted by the Idaho Department of Environmental Quality (IDEQ) on June 8, 2012 and July 8, 2014. The details of the submitted revisions and the EPA's action are outlined below and in the enclosed support document.

### Background

By letter of June 8, 2012 (Idaho Docket 58-0102-1103), IDEQ submitted a number of revisions to the antidegradation provisions of its water quality standards rule that made it consistent with the previously approved changes to the Idaho statute brought about by the 2011 Legislature's passage of House Bill 153. The corresponding provisions in Idaho statute were approved by the EPA on August 18, 2011. The revisions to IDEQ's water quality standards rule became effective under Idaho state law on March 29, 2012 and were certified by the Idaho Attorney General on April 13, 2012 as being duly adopted pursuant to state law.

The revisions submitted to the EPA for review are identified in the following document that was included with IDEQ's June 8, 2012 letter:

- Notice of Rulemaking – Proposed Rule, Docket No. 58-0102-1103, Idaho Administrative Bulletin, Vol. 11-7, pages 140-274, July 6, 2011, which contains proposed amendments to Chapter 58.01.02 of the Idaho Administrative Code that were adopted without change (IDEQ file: "*58-0102-1103 Notice of Proposed Rule, AdminBull\_11-07.pdf*"). (Additions are underlined, deletions are struck out)

By letter of July 8, 2014 (Idaho Docket 58-0102-1301), IDEQ submitted revisions to the Tier 2 insignificant degradation provision of both Idaho statute and Idaho's water quality standards rule. These revisions to Idaho statute (Idaho Code § 39-3603(2)(c), set forth in House Bill 392) and the water quality standards rule (IDAPA 58.01.02. 052.08.a) became effective under Idaho state law on March 11, 2014 and June 4, 2014, respectively, and were certified by the Idaho Attorney General on July 7, 2014 as being duly adopted pursuant to state law. The revisions were in response to the EPA's July 23, 2013 disapproval, upon remand, of the Tier 2

insignificant degradation provision in statute that the EPA had approved on August 18, 2011 (*Greater Yellowstone Coalition v. EPA*, Case No. 4:12-cv-60, D. Idaho).

The revisions submitted to the EPA for review are identified in the following documents that were included with IDEQ's July 8, 2014 letter:

- House Bill 392 (HB 392), which contains amendments to section 39-3603(2)(c) of the Idaho Code (IDEQ file: "*58-0102-1301 HB 392 - Amendment of water quality law regarding insignificant degradation.pdf*"). (Additions are underlined, deletions are struck out)
- Notice of Rulemaking – Adoption of Temporary and Pending Rule, Docket No.58-0102-1301, Idaho Administrative Bulletin, Vol. 14-6, pages 106-114, June 4, 2014, which contains amendments to Chapter 58.01.02 of the Idaho Administrative Code (IDEQ file: "*58-0102-1301 Temporary-Proposed Rule Notice.pdf*"). (Additions are underlined, deletions are struck out)

Idaho's process for adopting the submitted revisions, including the opportunity for public comment, is described in IDEQ's June 8, 2012 and July 8, 2014 submittal letters.

The June 8, 2012 and July 8, 2014 submittals also include revisions to IDAPA 58.01.02.140.12 and 278 (reinstatement of use designations for eight Boise River tributaries to address the EPA's November 29, 2004 disapproval) and section 055 ("Water Quality Limited Waters and TMDLs"), respectively. The EPA is *not* addressing those revisions today. Instead, in today's action, the EPA is only addressing the submitted revisions to the antidegradation provisions of Idaho statute and water quality standards rule. The EPA will continue to work towards providing an appropriate response to the revisions submitted on June 8, 2012 and July 8, 2014 that are not addressed by today's action.

### **Today's Action**

The EPA is approving the revisions to the following antidegradation provisions submitted by IDEQ with the June 8, 2012 and July 8, 2014 letters. The EPA is acting under authority provided in section 303(c) of the CWA and 40 CFR Part 131.

- Idaho Code section 39-3603(2)(c) through (c)(iii) (*Tier II analysis for insignificant degradation*); and,
- Idaho Administrative Code, Chapter 58.01.02, sections 051.03 (*Outstanding Resource Water (Tier III Protection)* policy statement), 052.03 (*General Permits*), 052.05.c.ii (*Identification of Tier II Waters*), 052.08.a thru 052.08.a.iii (*Tier II analysis Insignificant Degradation*, as submitted on July 8, 2014\*), and 056 in its entirety (deletion of *Special Resource Waters* (SRW) provisions and associated "housekeeping")

\* The June 8, 2012 submittal included an insignificant degradation provision in Idaho's water quality standards rule, which was replaced by subsequent rule revision submitted on July 8, 2014. Therefore, the EPA is only acting on the insignificant degradation provision submitted on July 8, 2014. The EPA no longer considers the version of the insignificant degradation provision submitted on June 8, 2012 to be before the EPA for action.

The antidegradation provisions submitted on June 8, 2012 and approved today were largely already in statute and approved by the EPA on August 18, 2011. The EPA is approving these provisions for largely the same reasons as stated in its August 18, 2011 action. The revisions submitted on July 8, 2014 remedy the EPA's July 23, 2013 disapproval of the Tier 2 insignificant degradation provision in Idaho statute. As a result of today's approval, the Tier 2 insignificant degradation provision of section 39-3603(2)(c) of the Idaho Code, and Chapter 58.01.02, section 052.08.a of Idaho Administrative Code is in effect for CWA purposes when implementing antidegradation in Idaho.

This action applies only to water bodies in the State of Idaho, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this letter shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

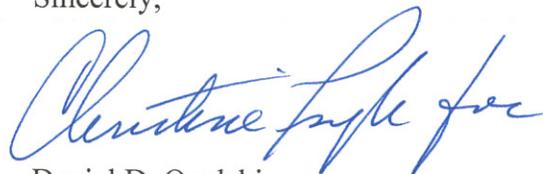
The EPA is not acting on the revisions to the following antidegradation provisions submitted by the IDEQ with the June 8, 2012 letter.

- Idaho Administrative Code, Chapter 58.01.02, sections 010.19 (definition of *Degradation or Lower Water Quality*), 010.42 (definition of *General Permit*), and 052.05 thru 052.05.c.i (*Identification of Tier II Waters*).

Since these revisions to IDEQ's water quality standards rule contain the same language as the Idaho statute that EPA approved on August 18, 2011, EPA has determined that these revisions are not new or revised water quality standards for which EPA must take action. Instead, these revisions simply reflect existing provisions in Idaho statute that are already in effect for CWA purposes.

The EPA looks forward to future work with Idaho on water quality standards pursuant to our responsibilities under the CWA. If you have any questions regarding this letter, please contact me at 206-553-1855 or Bill Beckwith of my staff at 206-553-2495.

Sincerely,



Daniel D. Opalski  
Director, Office of Water and Watersheds

Enclosure

cc: Mr. Michael McIntyre, Surface Water Program Manager  
Idaho Department of Environmental Quality

Mr. Don Essig, Water Quality Standards Manager  
Idaho Department of Environmental Quality



# Support Document

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The EPA's Action on Revisions to Idaho's Antidegradation Provisions Submitted June 8, 2012 (Idaho Docket 58-0102-1103) and July 8, 2014 (Idaho Docket 58-0102-1301), Including Approval of Revisions to Address EPA's July 23, 2013 Disapproval of Idaho Code § 39-3603(2)(c) (Tier II analysis for insignificant degradation)

September 26, 2014

## **Background**

On November 12, 2010, the Idaho Board of Environmental Quality (Board) adopted revisions to Idaho's water quality regulations at IDAPA 58.01.02 incorporating antidegradation implementation procedures. Those revisions were submitted to the 2011 Idaho Legislature for review. The Legislature approved most of the regulatory revisions adopted by the Board, but rejected a portion of the revisions and adopted House Bill 153 which revised the Idaho Code to include sections addressing antidegradation. The antidegradation provisions added to Idaho law by House Bill 153 corresponded to the portions of the rule rejected by the Legislature. Combined, the two documents listed below show the antidegradation provisions that were a product of that process. The regulatory changes that were approved by the Legislature are identified in the document entitled "Excerpt of Official 2011 Idaho Administrative Code," and the revisions made by the Legislature to the Idaho Code are set forth in House Bill 153.

- House Bill 153, which contains amendments to Sections 39-3601, 39-3602, and 39-3603 of the Idaho Code (IDEQ file: "*58-0102-1001 HO 153 Amendment of water quality law regarding antidegradation.pdf*"). (Additions are underlined, deletions are struck out);
- Excerpt of Official 2011 Idaho Administrative Code, Chapter 58.01.02, *Water Quality Standards*, which contain revisions in the form of additions to the State's water quality standards rule (IDEQ file: "*58-0102-1001 Sections 10. 051, & 052 from IDWQS\_2011 with highlighted changes*," with cover page titled "Note on Excerpt of Official 2011 Idaho Administrative Code").

By letter of April 15, 2011, the Idaho Department of Environmental Quality (IDEQ) submitted these revisions to its water quality standards rule (Idaho Administrative Code) and Idaho water quality statute (Idaho Code) to the U.S. Environmental Protection Agency (EPA) for review and action (Idaho docket 58-0102-1001). Together, these revisions, along with the existing provisions in Idaho's water quality standards rule for Outstanding National Resource Waters (referred to as "Outstanding Resource Waters," or ORWs, in Idaho), established methods for implementing Idaho's antidegradation policy at IDAPA 58.01.02.051.

On August 18, 2011, the EPA approved the water quality standards revisions to the Idaho Administrative Code (IDAPA 58.01.02.10, 58.01.02.051, and 58.01.02.052) and Idaho Code (Idaho Code §§ 39-3601, 39-3602, and 39-3603, set forth in House Bill 153).

Idaho Code §39-3603 included a provision that required IDEQ to automatically deem insignificant any change in activity or discharge that will not cumulatively decrease assimilative capacity by more than 10%. In such a case, no Tier 2 analysis would be required for those activities or discharges. See Idaho Code §39-3603(2)(c), as set forth in House Bill 153 ("If an activity or discharge is determined to be insignificant, then no further Tier II analysis for other source controls, alternatives analysis or socioeconomic justification is required.") and Idaho Code §39-3603(2)(c)(i), as set forth in House Bill 153 ("The department shall determine insignificance when the proposed change in an activity or discharge, from conditions as of July 1, 2011, will not cumulatively decrease assimilative capacity by more than ten percent (10%)").

By letter of June 8, 2012 (Idaho Docket 58-0102-1103), IDEQ submitted a number of revisions to the antidegradation provisions of its water quality standards rule that made it consistent with changes to the Idaho Statute brought about by the 2011 Legislature's passage of House Bill 153. The revisions to IDEQ's water quality standards rule became effective under Idaho state law on March 29, 2012 and were certified by the Idaho Attorney General on April 13, 2012 as being duly adopted pursuant to state law. The revisions to IDEQ's water quality standards rule included the Tier 2 insignificant degradation provision of House Bill 153 (Idaho Code § 39-3603(2)(c)). IDAPA 58.01.02.052.08.a.

On February 14, 2012, Greater Yellowstone Coalition challenged, in part, the EPA's approval of Idaho Code § 39-3603(2)(c), including the Tier II insignificant degradation provision, in the U.S. District Court for the District of Idaho. On April 24, 2013, the Court issued an order in part granting a 90-day voluntary remand on the EPA's approval of Idaho Code § 39-3603(2)(c). *See Greater Yellowstone Coal. v. U.S. Envtl. Prot. Agency*, No. 4:12-cv-60, 2013 U.S. Dist. LEXIS 59661 (D. Idaho Apr. 24, 2013).

On July 23, 2013, upon reconsideration, the EPA disapproved as a new or revised water quality standard the Tier II insignificant degradation provision at Idaho Code § 39-3603(2)(c). The EPA also noted that it had not yet acted on IDEQ's June 8, 2012, submittal of revisions to the Idaho water quality standards rule that made the antidegradation language consistent with the legislative language from House Bill 153. The EPA stated that when it did act on that submission, it intended to act on the addition of the Tier II insignificant degradation provision found at IDAPA58.01.02.052.08.a, consistent with its disapproval action on Idaho Code § 39-3603(2)(c).

In response to the EPA's July 23, 2013 disapproval of the insignificant degradation provision in statute, on July 8, 2014, IDEQ submitted revisions to the insignificant degradation provision as it appears in both the Idaho water quality statute and Idaho's water quality standards rule. The revisions to Idaho statute (Idaho Code § 39-3603(2)(c), set forth in House Bill 392) and the water quality standards rule (IDAPA 58.01.02.052.08.a) became effective under Idaho state law on March 11, 2014 and June 4, 2014, respectively, and were certified by the Idaho Attorney General on July 7, 2014 as being duly adopted pursuant to state law. Because the insignificant degradation provision in Idaho's water quality standards rule submitted on June 8, 2012 was replaced by subsequent rule revision submitted on July 8, 2014, the EPA is only acting on the insignificant degradation provision submitted on July 8, 2014. The EPA no longer considers the version of the insignificant degradation provision submitted on June 8, 2012 to be before the EPA for action. The EPA is, however, acting on certain other antidegradation provisions of the June 8, 2012 submission.

For procedural reasons under Idaho law, the revision to the insignificant degradation provision of Idaho's Administrative Code was adopted as both a temporary and pending rule. The temporary rule became effective under Idaho state law on June 4, 2014, and IDEQ expects that the companion pending rule will be final upon adjournment of the 2015 Idaho legislature. In its July 8, 2014 submittal letter, IDEQ indicated that it would notify the EPA when the temporary rule has become permanent. If the insignificant degradation provision of Idaho Code and/or Idaho's

Administrative Code is amended, IDEQ would need to submit such changes to the EPA for review and approval or disapproval.

The revisions submitted to the EPA are identified in the following documents that were included with IDEQ's June 8, 2012 and July 8, 2014 letters:

With the June 8, 2012 submittal letter:

- Notice of Rulemaking – Proposed Rule, Docket No. 58-0102-1103, Idaho Administrative Bulletin, Vol. 11-7, pages 140-274, July 6, 2011, which contains proposed amendments to Chapter 58.01.02 of the Idaho Administrative Code that were adopted without change (IDEQ file: “58-0102-1103 Notice of Proposed Rule, AdminBull\_11-07.pdf”). (Additions are underlined, deletions are struck out)

With the July 8, 2014 submittal letter:

- House Bill 392 (HB 392), which contains amendments to Section 39-3603(2)(c) of the Idaho Code (IDEQ file: “58-0102-1301 HB 392 - Amendment of water quality law regarding insignificant degradation.pdf”). (Additions are underlined, deletions are struck out);
- Notice of Rulemaking – Adoption of Temporary and Pending Rule, Docket No. 58-0102-1301, Idaho Administrative Bulletin, Vol. 14-6, pages 106-114, June 4, 2014, which contains amendments to Chapter 58.01.02 of the Idaho Administrative Code (IDEQ file: “58-0102-1301 Temporary-Proposed Rule Notice.pdf”). (Additions are underlined, deletions are struck out)

The June 8, 2012 and July 8, 2014 submittals included revisions to IDAPA 58.01.02.140.12 and 278 (reinstatement of use designations for eight Boise River tributaries to address the EPA's November 29, 2004 disapproval) and section 055 (“Water Quality Limited Waters and TMDLs”), respectively. The EPA is *not* addressing those revisions today. Today, the EPA is only addressing the submitted revisions to the antidegradation provisions of Idaho statute and water quality standards rule. The EPA will continue to work towards providing an appropriate response to the revisions submitted on June 8, 2012 and July 8, 2014 that are not addressed by today's action.

### **EPA's Antidegradation Regulation and Guidance on Tier 2 *de minimis* Exceptions**

The EPA's water quality standards regulation at 40 CFR § 131.12 requires states to adopt an antidegradation policy and to identify methods for implementing that policy. The purpose of an antidegradation policy is to maintain and protect existing uses and high quality waters. The antidegradation policy must, at a minimum, be consistent with the provisions of 40 CFR § 131.12(a)(1)-(4). The federal antidegradation provisions establish three levels of water quality protection that are commonly referred to as Tier 1, Tier 2, and Tier 3.

For Tier 1, the antidegradation policy must provide for the maintenance and protection of all existing uses and water quality conditions necessary to support such uses. 40 CFR §

131.12(a)(1). For Tier 2, the policy must also require the maintenance and protection of high quality waters unless the state finds “that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located,” a process referred to as “Tier 2 review.” 40 CFR § 131.12(a)(2). For Tier 3, the policy must provide for the maintenance and protection of water quality in Outstanding National Resource Waters identified by the state. 40 CFR § 131.12(a)(3).

Tier 2 protection applies when “the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water.” 40 CFR § 131.12(a)(2). The regulation at 40 CFR § 131.12(a)(2) provides further that Tier 2 water “quality shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the State’s continuing planning process, that allowing lower water quality is necessary to accommodate important economic or social development in the area in which the waters are located. In allowing such degradation or lower water quality, the State shall assure water quality adequate to protect existing uses fully.” This Tier 2 standard seeks to protect the water body’s available “assimilative capacity” for the propagation of fish, shellfish, and wildlife and recreation in and on the water. Available assimilative capacity is the amount by which the water body exceeds the quality necessary to support a given use.

The text of 40 CFR § 131.12(a)(2) does not provide directly for insignificant degradation (also referred to as *de minimis* exceptions) to the Tier 2 antidegradation review process. Regulatory provisions containing *de minimis* exceptions are authorized pursuant to case law recognizing an “administrative law principle which allows an agency to create unwritten exceptions to a statute or rule for insignificant or *de minimis* matters.” *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 483 (6th Cir. 2008) (citation omitted). The authority to create a *de minimis* exception “is not an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.” *Id.* (citation omitted). The implied *de minimis* provision authority is “narrow in reach and tightly bounded by the need to show that the situation is genuinely *de minimis* or one of administrative necessity.” *Id.* (citation omitted). Accordingly, this authority only applies “when the burdens of regulation yield a gain of trivial or no value.” *Id.* (citations omitted). Finally, a “[d]etermination of when matters are truly *de minimis* naturally will turn on the assessment of particular circumstances, and the agency will bear the burden of making the required showing.” *Id.* (citations omitted). Courts have recognized that *de minimis* exceptions are permissible under EPA’s antidegradation regulations. *See, e.g., Ohio Valley Env’tl. Coal. v. Horinko*, 279 F. Supp. 2d 732, 769 (S.D. W.Va. 2003).

Many states and tribes have adopted provisions that allow for *de minimis* exceptions to their antidegradation requirements with the EPA’s approval. Such provisions have ranged from simple to complex, may involve qualitative or quantitative measures or both, and may vary by category of pollutant. Tier 2 antidegradation *de minimis* provisions may allow states and tribes to assign a greater proportion of available staff resources to high priority reviews that are likely to yield the greatest environmental benefits. In other words, *de minimis* provisions may allow states and tribes to more effectively review those proposed activities that pose the greatest threats to ambient water quality conditions, and thereby better maintain and protect high quality waters.

The EPA has addressed the subject of insignificant or *de minimis* exceptions to antidegradation requirements in several documents. For example, several regions have issued guidance discussing the concept of “significant” degradation and have recommended that certain types of pollutants, such as bioaccumulatives, receive special consideration in determining whether an activity or discharge should undergo a Tier 2 review.<sup>1</sup>

The *de minimis* exception issue was considered at length in developing the water quality requirements for the Great Lakes System. In the “Water Quality Guidance for the Great Lakes System Supplementary Information Document (SID),” EPA-820-B-95-001, pages 385-386 (March 1995),<sup>2</sup> the EPA explained its intent in allowing states and tribes to use *de minimis* exceptions:

*EPA’s goal in allowing States and Tribes to identify certain increases as de minimis was to provide a means of reducing the administrative burden on all parties associated with activities of little or no consequence to the environment. . . . De minimis provisions provide a means for States and Tribes to differentiate between actions that will result in an increased loading of a pollutant to a receiving water that is likely to have a significant impact on water quality and those that are unlikely to do so and focus review efforts on actions that will degrade water quality.*

In the EPA’s 1998 “Advance Notice of Proposed Rulemaking for the Water Quality Standards Regulation” (ANPRM), 63 FR 36742, 36783 (July 7, 1998), the EPA reiterated these statements regarding *de minimis* and discussed how Tier 2 antidegradation requirements may vary depending on the type of pollutants.

*Applying antidegradation requirements only to activities that will result in significant degradation is a useful approach that allows States and Tribes to focus limited resources where they may result in the greatest environmental protection. However, there is a great deal of variation in how States and Tribes define significant degradation. Significance tests range from simple to complex, involve qualitative or quantitative measures or both, and may vary depending upon the type of pollutant (e.g., the approach may be different for highly toxic or bioaccumulative pollutants).*

In 2005, the EPA issued a national policy memorandum that provided additional recommendations regarding significance thresholds for purposes of Tier 2 review.<sup>3</sup> As with the

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<sup>1</sup> See EPA Region V Guidance for Antidegradation Policy Implementation for High Quality Waters (Dec. 1986), page 5

([http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region5\\_antideg\\_guidance.pdf](http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region5_antideg_guidance.pdf)); EPA Region I Guidance for Antidegradation Policy Implementation for High Quality Waters (March 1987), pages 5-6

([http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region1\\_antideg\\_guidance.pdf](http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region1_antideg_guidance.pdf)); EPA Region IX Guidance on Implementing the Antidegradation Provisions of 40 CFR 131.12 (June 1987), page 8 ([http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region9\\_antideg\\_guidance.pdf](http://water.epa.gov/scitech/swguidance/standards/adeq/upload/Region9_antideg_guidance.pdf)).

<sup>2</sup> Available at: [http://www.epa.gov/gliclear/docs/usepa\\_sid.pdf](http://www.epa.gov/gliclear/docs/usepa_sid.pdf).

<sup>3</sup> U.S. Environmental Protection Agency Memorandum, “Tier 2 Antidegradation Reviews and Significance Thresholds,” from Ephraim S. King, Office of Science and Technology, to Water

1998 ANPRM, the 2005 memorandum generally recommended adoption of appropriate *de minimis* provisions that are consistent with the goal of maintaining and protecting high quality waters:

*[I]t is important that states and tribes set their significance thresholds at a level that can be demonstrated to be consistent with the purpose of [T]ier 2 antidegradation requirements. Otherwise, a new or increased discharge may result in significant degradation that will not be subject to antidegradation review, and decisions about lowering of water quality in high quality waters may be made without public consideration of necessity and importance, resulting in the loss or diminishment of a valuable natural resource.*

### **Today's Action**

The EPA is approving the revisions to the following antidegradation provisions submitted by the IDEQ with the June 8, 2012 and July 8, 2014 letters. The EPA is acting under authority provided in Section 303(c) of the CWA and 40 CFR Part 131.

- Idaho Code section 39-3603(2)(c) thru (c)(iii) (*Tier II analysis for insignificant degradation*); and,
- Idaho Administrative Code, Chapter 58.01.02, sections 051.03 (*Outstanding Resource Water (Tier III Protection) policy statement*), 052.03 (*General Permits*), 052.05.c.ii (*Identification of Tier II Waters*), 052.08.a thru 052.08.a.iii (*Tier II analysis Insignificant Degradation*, as submitted on July 8, 2014\*), and 056 in its entirety (deletion of *Special Resource Waters (SRW)* provisions and associated “housekeeping”)

\* As discussed in the background section, because the insignificant degradation provision in Idaho’s water quality standards rule submitted on June 8, 2012 was replaced by subsequent rule revision submitted on July 8, 2014, EPA is acting on the July 8, 2014 insignificant degradation provision, not the June 8, 2012 version.

This action applies only to water bodies in the State of Idaho, and does not apply to waters that are within Indian Country, as defined in 18 U.S.C. § 1151. In addition, nothing in this letter shall constitute an approval or disapproval of a water quality standard that applies to waters within Indian Country. The EPA, or authorized Indian Tribes, as appropriate, will retain responsibilities for water quality standards for waters within Indian Country.

The EPA is not acting on the revisions to the following antidegradation provisions submitted by the IDEQ with the June 8, 2012 letter.

- Idaho Administrative Code, Chapter 58.01.02, sections 010.19 (definition of *Degradation or Lower Water Quality*), 010.42 (definition of *General Permit*), and 052.05 thru 052.05.c.i (*Identification of Tier II Waters*).

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Management Division Directors, Region 1-10 (Aug. 10, 2005), available at: <http://water.epa.gov/scitech/swguidance/standards/adeg/upload/tier2.pdf>.

Since these revisions to IDEQ's water quality standards rule contain the same language as the Idaho statute that the EPA approved on August 18, 2011, the EPA has determined that these revisions are not new or revised water quality standards for which the EPA must take action. Instead, these revisions simply reflect existing provisions in Idaho statute that are already in effect for CWA purposes. A reference to the EPA's basis for its August 18, 2011 approval is provided in the table on page 10. IDEQ's adoption of these provisions into rule was a housekeeping action that ensures consistency with the previously approved provisions in Idaho statute and places the various components of Idaho's antidegradation implementation methods in one location. Having the various components of Idaho's antidegradation implementation methods in one location in rule will facilitate awareness and understanding of Idaho's antidegradation requirements.

## **Rationale for the EPA's Action**

### **June 8, 2012 Submittal**

The EPA's basis for approving revisions to the following sections of Idaho Administrative Code, Chapter 58.01.02, is discussed below: sections 051.03 (*Outstanding Resource Water (Tier III Protection)* policy statement), 052.03 (*General Permits*), 052.05.c.ii (*Identification of Tier II Waters*), and 056 in its entirety (deletion of *Special Resource Waters* (SRW) provisions and associated "housekeeping").

While the revisions to the sections of IDEQ's water quality standards rule specified above generally reflect the same language as in the corresponding provisions of Idaho statute that the EPA approved on August 18, 2011, there are instances where IDEQ's translation of the statutory provisions into rule resulted in more than simply reprinting the statutory language. Therefore, the EPA is providing the following clarifying discussion of these rule revisions and the EPA's basis for approval. The EPA is approving these revisions to IDEQ's water quality standards rule as being consistent with the CWA and 40 CFR 131.12 for the same reasons it approved the corresponding statutory provisions on August 18, 2011, as supplemented by the following discussion.

#### IDAPA 58.01.02.051.03 (Outstanding Resource Water policy statement)

The revision to the Outstanding Resource Water (ORW) policy statement at IDAPA 58.01.02.051.03 make it consistent with the wording of the ORW policy statement at section 39-3603(1)(c) of the Idaho statute. While this revision to the water quality standards rule removed the language "such as waters of national and state parks and wildlife refuges and waters of exceptional recreational or ecological significance," which identified types of waters that might be candidates for ORW designation, that language remains in the definition of ORWs in both Idaho statute and rule (Idaho Code § 39-3602(20) and IDAPA 58.01.02.010.72). Therefore, when the ORW policy statement is read with the ORW definition, the policy statement is effectively unchanged and is approved because it remains consistent with the federal Outstanding National Resource Water (ONRW) policy at 40 CFR § 131.12(a)(3) (ONRWs are referred to as ORWs in Idaho).

#### IDAPA 58.01.02.052.03 (General Permits)

The “General Permits” provisions in Idaho statute (Idaho Code § 39-3603(2)(a)) and IDEQ’s water quality standards rule (IDAPA 58.01.02.052.03) are substantively the same. However, in the last sentence of the provision, the statutory language that the EPA approved on August 18, 2011 refers to “...the least degrading alternative as specified in the department’s rules,” while the language in IDEQ’s water quality standards rule refers to “...the least degrading alternative as specified in Subsection 052.08(c).” To address the intent of the statute, IDAPA 58.01.02.052.03 actually lists the section of IDEQ’s water quality standards rule that addresses alternatives analysis. The EPA approves the added reference to the section of IDEQ’s water quality standards rule that addresses alternatives analysis as providing useful information concerning implementation of Idaho’s antidegradation methods for general permits.

#### IDAPA 58.01.02.052.05.c.ii (Identification of Tier II Waters for Recreational Uses)

“The Identification of Tier II Waters” provisions in Idaho statute (Idaho Code § 39-3603(2)(b)) and IDEQ’s water quality standards rule (IDAPA 58.01.02.052.05 thru 052.05.c.ii) are substantively the same. However, when addressing whether a water will receive Tier II protection for recreational uses, the statutory language that the EPA approved on August 18, 2011 refers to “water quality criteria listed in the department’s rules,” while the language in IDEQ’s water quality standards rule at section 58.01.02.052.05.c.ii refers to “water quality criteria listed in Sections 200, 210, 251, and 275 (where applicable).” To address the intent of the statute, IDAPA 58.01.02.052.05.c.ii actually lists the sections of IDEQ’s water quality standards rule where criteria that are applicable to recreational uses are specified. The EPA approves the added references to recreational criteria as providing useful information concerning implementation of Idaho’s methods for identifying Tier II waters.

#### IDAPA 58.01.02.056 (Special Resource Waters)

On August 18, 2011, the EPA approved Idaho Code § 39-3603(2)(b)(iv) as ensuring that waters determined to be Special Resource Waters (SRW) in accordance with IDAPA 58.01.02.056 would, “at a minimum, receive Tier 2 protection where it is determined to be applicable in accordance with Idaho’s water body approach.” (See Support Document, Review of Idaho’s Antidegradation Implementation Methods, Idaho docket 58-0102-1001, August 17, 2011, page 6) With the revisions submitted on June 8, 2012, IDEQ deleted IDAPA 58.01.02.056, the associated SRW designations at IDAPA 58.01.02.110 thru 160, and the definition of SRW at IDAPA 58.01.02.010.92. The deletions clarify IDEQ’s interpretation that Idaho Code § 39-3603(2)(b)(iv) eliminated SRWs altogether.

The EPA is approving IDEQ’s removal of IDAPA 58.01.02.056, the associated SRW designations, and the SRW definition from its water quality standards rule as being consistent with the CWA and 40 CFR 131.12 because IDEQ’s water quality standards retain Tier 1, Tier 2 and Tier 3 provisions previously approved by the EPA as being

consistent with the federal antidegradation policy at 40 CFR § 131.12. IDEQ's SRW provision was an addition to the Tier 1, Tier 2 and Tier 3 provisions and is not required for consistency with the CWA and 40 CFR § 131.12. Waters that were designated as SRWs will continue to receive Tier 1 protection ("All waters receive Tier I protection," IDAPA 58.01.02.052.01) and would receive Tier 2 protection if it is determined to be applicable in accordance with IDAPA 58.01.02.052.05. Idaho also has the discretion to designate former SRWs as ORWs if desired.

For reference, the table below provides the citation for IDEQ's revised water quality standards rule provisions that were submitted on June 8, 2012, the corresponding citation to the same provision in Idaho statute, and the section of the August 17, 2011 support document that explains the EPA's basis for approving the provision in statute on August 18, 2011 (Support Document, Review of Idaho's Antidegradation Implementation Methods, Idaho docket 58-0102-1001, August 17, 2011). As discussed above, EPA is not acting on Idaho Administrative Code, Chapter 58.01.02, sections 010.19, 010.42, and 052.05 thru 052.05.c.i as new or revised water quality standards.

<b>Idaho Administrative Code</b>	<b>Corresponding Idaho Statute</b>	<b>Location of Basis for EPA's August 18, 2011 Approval of the Provision in Statute</b>
58.01.02.010.19	39-3602(6)	II.B.2 Definition of Degradation, pages 7-9*
58.01.02.010.42	39-3602(14)	VI. Antidegradation Analysis for General Permits, page 31
58.01.02.051.03	39-3603(1)(c)	V. Outstanding National Resource Water Protection Process, page 28
58.01.02. 052.03	39-3603(2)(a)	VI. Antidegradation Analysis for General Permits, pages 28- 31
58.01.02.052.05 thru 052.05.c.ii	39-3603(2)(b)	II.B.1 Waterbody Approach, pages 4-7
58.01.02.056	39-3603(2)(b)(iv)	II.B.1 Waterbody Approach, page 6

\* The EPA's approval of Idaho's definition of "Degradation" was upheld by the U.S. District Court for the District of Idaho. See April 24, 2013 Memorandum Decision and Order, *Greater Yellowstone Coalition v. EPA*, Case No. 4:12-cv-60 (D. Idaho).

### **July 8, 2014 Submittal**

The EPA's basis for approving revisions to Idaho Code § 39-3603(2)(c) thru (c)(iii) and IDAPA 58.01.02.052.08.a thru 052.08.a.iii (*Tier II analysis for insignificant degradation*) are discussed below.

The EPA is approving the revisions to the insignificant degradation provision of Idaho Code § 39-3603(2)(c) and IDAPA 58.01.02.052.08.a as being consistent with the CWA and 40 CFR § 131.12, because the revised insignificant degradation provision is consistent with one of the remedy options suggested in EPA's July 23, 2013 disapproval action.

The EPA disapproved Idaho Code § 39-3603(2)(c) because it required IDEQ to deem insignificant, and therefore exempt from Tier 2 review, proposed activities or discharges involving bioaccumulative pollutants that would not cumulatively decrease assimilative capacity by more than 10%. As explained in the support document for the disapproval, it is the EPA's view that even a seemingly small discharge of a bioaccumulative pollutant may, in fact, cause significant degradation. The EPA concluded that because Idaho Code § 39-3603(2)(c) required IDEQ to exempt every discharge or activity involving a bioaccumulative pollutant that met the "insignificance" test from Tier 2 review, without the ability to consider such discharges or activities on a case-by-case basis, Idaho could have been required to use the provision where the proposed activity or discharge would not be truly insignificant (i.e., *de minimis*). (See Technical Support Document, The EPA Disapproval of Idaho Code § 39-3603(2)(c) under Section 303(c) of the Clean Water Act, July 23, 2013) One of several options for remedy suggested by the EPA, as outlined in its Technical Support Document, was:

*Revise Idaho Code § 39-3603(2)(c) with respect to its mandatory requirement to exempt all proposed activities that meet the "insignificance" test. For example, the language in the provision could be modified from "the Department shall determine insignificance ..." to "the Department may determine insignificance..." By removing the mandatory de minimis requirement, IDEQ would have discretion to determine on a case-by-case basis whether there would be an insignificant lowering of water quality that would, therefore, not be subject to a Tier 2 review. The EPA would expect Idaho to carefully consider any proposed lowering of water quality by bioaccumulative pollutants before determining that it would be insignificant. In addition, Idaho's decision that a proposed lowering of water by bioaccumulative pollutants would be insignificant, in any given instance, would be open to public review and input.*

Consistent with the EPA's suggested remedy, the State replaced "shall" with "may" in both statute and rule. This revision removed the mandatory requirement to exempt from Tier 2 review all proposed activities that would cumulatively use 10% or less of the assimilative capacity, and gave IDEQ the discretion to determine that any use of assimilative capacity would be significant. That discretion applies broadly and is applicable to bioaccumulative pollutants because Idaho's provision includes consideration of "the...character of the activity or discharge" (emphasis added). The presence of bioaccumulative pollutants in a discharge would be part of its "character." IDEQ's response to comments supports this interpretation as shown below (See IDEQ's Rulemaking and Public Comment Summary, IDEQ file: 58-0102-1301 August 2013 Negotiated Rulemaking sign-in sheet.pdf). The EPA reads "where appropriate" in IDEQ's response to comments to mean where bioaccumulatives are present.

*... the character of the discharge and the magnitude of its effect on the receiving stream will allow DEQ, where appropriate, to consider the bioaccumulative nature of the discharge.*

Idaho's revised provision in statute:

*(c) Tier II analysis for 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, shall constitute significant degradation. If the cumulative decrease in assimilative capacity from conditions as of July 1, 2011, is equal to or 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. (emphasis added)*

*(ii) The department may request additional information from the applicant as needed to determine the significance of the degradation.*

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

The same revised provision in Idaho's water quality standards rule with references to the sections of the rule that address other source controls, alternatives analysis, and socioeconomic justification added by IDEQ at section 08.a.iii:

*08. Tier II Analysis...*

*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, shall constitute significant degradation. If the cumulative decrease in assimilative capacity from conditions as of July 1, 2011, is equal to or 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. (emphasis added)*

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

*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.*

As a result of today's approval, the Tier 2 insignificant degradation provision of section 39-3603(2)(c) of the Idaho Code, and Chapter 58.01.02, section 052.08.a of Idaho Administrative Code is in effect for CWA purposes when implementing antidegradation in Idaho.

