

## **Supplemental Justification**

### **Change in Idaho WQS, Docket 58-0102-1301**

#### **Modification of antidegradation implementation procedures regarding insignificant discharges**

DEQ initiated this rulemaking docket in response to U.S. Environmental Protection Agency (EPA) disapproval of the water quality standards provision that exempts, from Tier II antidegradation review, those activities or discharges determined to be insignificant (de minimus exemption). This provision is set out in IDAPA 58.01.02.052.08.a.

In November 2010, antidegradation implementation procedures were adopted by the Board and then submitted to the 2011 Idaho Legislature for review (Docket No. 58-0102-1001). Under House Concurrent Resolution 16 (HCR16), the Idaho Legislature rejected certain portions of the rule and approved the remainder of the rule. The 2011 Idaho Legislature also adopted House Bill 153 (HB153) which revised the Idaho Code to include sections addressing the definition of degradation, the treatment of general permits, the identification of Tier II waters, and insignificant discharges or activities (codified at Idaho Code §§39-3601, 39-3602, 39-3603, and 39-3623). The new sections added to Idaho law by HB153 correspond to the portions of the rule rejected by HCR16.

In April 2011, DEQ submitted revisions to its water quality standards administrative rule (Docket No. 58-0102-1001) and corresponding revisions to the Idaho Code to EPA for review and action. In August 2011, EPA approved the revisions as submitted.

In November 2011, the Board adopted [Docket No. 58-0102-1103](#), which included revisions to make the language on implementation of antidegradation procedures in Idaho's water quality standards complete and consistent with changes in state law brought about by the 2011 Legislature's passage of HB153.

On February 14, 2012, Greater Yellowstone Coalition (GYC) brought an action in the U.S. District Court for the District of Idaho (Court) challenging EPA's approval of Idaho's definition of "degradation" of water quality and Idaho's mandatory exemption from review for de minimus levels of discharge. The de minimus exemption provided for an automatic exemption from Tier II antidegradation review if the added pollution from a new or increased activity would cause less than a 10% cumulative loss of a water body's assimilative capacity as of July 1, 2011. GYC argued that the de minimus exemption could allow too much pollution. On April 24, 2013, the Court granted EPA's motion for remand of the de minimus issue and gave EPA 90 days to either 1) take a new action on the de minimus provision; or 2) inform the Court that it has determined not to take a new action, and to file a cross-motion for summary judgment and brief in support of that motion regarding the de minimus provision. The Court will retain jurisdiction to ensure a timely remand process and to allow the parties to challenge any new EPA decision in this case.

On July 23, 2013, EPA rescinded their approval of Idaho's de minimus exemption (EPA disapproval letter is available [here](#)). The Clean Water Act provides that if the state does not

adopt changes in its rule to address the disapproval within 90 days, EPA shall promulgate a standard for the state. Pursuant to this section of the Clean Water Act, EPA may be required to promptly prepare a Federal rule applicable to the state of Idaho. Idaho decided to enter into rulemaking, noticing its intention in the Aug. 7th, 2013 Idaho Administrative Bulletin. Additionally, Idaho undertook revisions to the Water Quality Act during the 2014 legislative session amending the Antidegradation Policy and Implementation section of Idaho Code.

Idaho's temporary rule and Idaho Code amendment follows the option outlined in EPA's disapproval letter that makes the insignificance determination discretionary when there is less than a 10% loss of assimilative capacity. EPA's stated concern was that there may be situations where an insignificance determination would be mandatory as the change in water quality would be less than 10% even though it may be a significant change in water quality, particularly for bioaccumulative substances. . The temporary and pending rule and amended Idaho Code (§39-3603(2)(c) sets insignificant degradation as no more than a 10% cumulative loss of assimilative capacity, and gives DEQ discretion to determine on a case-by-case basis that a smaller loss of assimilative capacity can be significant. Adoption of this rule docket addresses EPA's concern in one of the ways they suggested in their July 23, 2013 disapproval letter.

After consideration of public comments heard in the August 28, 2014 negotiated rulemaking meeting DEQ prepared a proposed rule. The proposed temporary rule was published in the December 4, 2013 Administrative Bulletin opening a 30-day period for public comment ending January 3, 2014. DEQ presented the final proposal to the Idaho Board of Environmental Quality at the May 2014 Board meeting for adoption as a temporary and pending rule. The Board approved adoption of the temporary and pending rule. The temporary rule went into effect on June 4, 2014. The pending rule is expected to be final upon adjournment of the 2015 legislative session if approved by the Idaho Legislature. Pursuant to Section 67-5226(1)(c), Idaho Code, the governor has found that temporary adoption of the rule is appropriate in order to comply with deadlines in federal programs and, therefore, avoid federal promulgation of Idaho's water quality standards.

Idaho Code §39-3603(2)(c) has been revised by the 2014 Idaho Legislature (House Bill 392) and went into effect on March 11, 2014. The temporary and pending rule is consistent with this legislation.