UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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OFFICE OF
WATER AND
WATERSHEDS

JUL 23 2013

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

Re: Antidegradation Implementation Methods (Idaho Docket Number 58-0102-1001)

Dear Mr. Burnell:

This letter is in reference to Idaho Code §39-3603(2)(c), which requires the State of Idaho to deem insignificant (*i.e.*, *de minimis*) any change in activity or discharge that will not cumulatively decrease assimilative capacity by more than 10%. The U.S. Environmental Protection Agency's 2011 approval of this statutory provision as a water quality standard was remanded to the EPA for its reconsideration in *Greater Yellowstone Coalition* v. *EPA*, Case No. 4:12-cv-60 (D. Idaho). The EPA has completed its reconsideration and is disapproving Idaho Code § 39-3603(2)(c) in accordance with Section 303(c) of the Clean Water Act (CWA) and 40 CFR Part 131.

Background

On August 18, 2011, the EPA took action on the water quality standards revisions to the Idaho Administrative Code and Idaho Statutes that established, *inter alia,* Idaho's antidegradation implementation methods (Idaho docket 58-0102-1001). In that action, the EPA approved the revisions to the water quality standards rule (at Chapter 58.01.02, Sections 10, 051, and 052 of the Idaho Administrative Code) and the revisions to the Idaho Statute (Sections 39-3601, 39-3602, and 39-3603 of the Idaho Code set forth in House Bill 153).

On February 14, 2012, Greater Yellowstone Coalition filed a complaint in the U.S. District Court of Idaho challenging in part the EPA's approval of Idaho Code § 39-3603(2)(c), which requires the State of Idaho to deem insignificant any proposed activity or discharge that will not cumulatively decrease assimilative capacity by more than 10%. On April 24, 2013, the Court issued an order in part granting the EPA's Motion for Voluntary Remand to reconsider its approval of Idaho Code § 39-3603(2)(c) and, specifically, to decide whether or how bioaccumulative pollutants should be addressed within that statutory provision. *See* April 24, 2013 Memorandum Decision and Order, *Greater Yellowstone Coalition v. EPA,* Case No. 4:12-cv-60 (D. Idaho).

Idaho also submitted certain new or revised water quality standards in June 2012 that make conforming edits to Idaho's regulations, including the addition of the provision that requires the State to deem insignificant any change in activity or discharge that will not cumulatively decrease assimilative capacity by more than 10% at Chapter 58.01.02.052.08.a. (Idaho

docket 58-0102-1103). The EPA has not yet acted on that submission and is not acting on that submission today. However, when the EPA acts on that submission, the EPA intends to act on the addition of the *de minimis* provision into Idaho's rules consistent with today's decision.

The EPA's Action

The EPA is disapproving Idaho Code § 39-3603(2)(c) because, in at least some cases, the provision could require Idaho to deem insignificant and, therefore, exempt from Tier 2 review, certain proposed activities or discharges involving bioaccumulative pollutants even though such activities or discharges may cause significant degradation. The EPA is only acting on this provision and is not taking action on any other provisions that the EPA previously approved on August 18, 2011.

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.

Result of Today's Action and Remedy to Address the EPA's Disapproval

As a result of today's disapproval, there is no *de minimis* provision in effect for CWA purposes when implementing the antidegradation water quality standard in Idaho. Therefore, proposed lowerings of water quality that would have been deemed insignificant (*i.e.*, *de minimis*) degradation in accordance with Idaho Code § 39-3603(2)(c) can be authorized if, after completion of a Tier 2 review, Idaho finds that such lowering is necessary to accommodate important economic or social development in the area in which the waters are located.

A specific provision for *de minimis* discharges is not a required element of a state's antidegradation requirements; therefore, it is not necessary for Idaho to adopt a new or revised *de minimis* provision in order to comply with CWA requirements. Whether or not Idaho decides to adopt and submit to the EPA a new or revised *de minimis* provision, Section 39-3603(2)(c) should be removed from the Idaho Code because it is not in effect for CWA purposes.

In response to today's disapproval, if Idaho chooses to adopt a new or revised *de minimis* provision in its antidegradation implementation procedures, there are several ways to remedy the EPA's disapproval. For example, one option is to revise the provision to exclude any proposed activity or discharge involving bioaccumulative pollutants from being automatically deemed "insignificant." Under this approach, any proposed activity or discharge involving bioaccumulative pollutants that would lower water quality must undergo a Tier 2 review. Another option is to make the *de minimis* provision discretionary so that Idaho would not automatically deem insignificant any proposed activity or discharge involving bioaccumulative pollutants that would not cumulatively decrease assimilative capacity by more than 10%. Under this option, the EPA would expect Idaho to carefully consider any proposed lowering of water quality for bioaccumulative pollutants before determining that it would be insignificant. With a discretionary provision, Idaho retains the ability to require Tier 2 review for any proposed

activity or discharge involving bioaccumulative pollutants, if the discharge in question could cause a significant lowering of water quality.

The EPA looks forward to working with Idaho as the State considers its response to today's action. If you have any questions regarding this letter please contact me at 206-553-1855 or you may contact Angela Chung, the Water Quality Standards Unit Manager, at 206-553-6511.

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

U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) – REGION 10

Technical Support Document

The EPA Disapproval of Idaho Code § 39-3603(2)(c) under Section 303(c) of the Clean Water Act

Remanded April 24, 2013

July 23, 2013

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. However, revisions to Idaho regulations are not final unless approved by the Idaho State Legislature. During the 2011 legislative session, the Legislature approved most of the regulatory revisions adopted by the Board but rejected a portion of the revisions. The regulatory revisions that were not accepted by the Legislature were deleted and new language was adopted by the Legislature through House Bill 153 that established statutory revisions to the Idaho Code. The two documents listed below are the final product of this legislative rule adoption process. Those regulatory changes (approved by the Legislature) are identified in the document entitled "Excerpt of Official 2011 Idaho Administrative Code" and those revisions made by the Legislature to the Idaho Code are set forth in House Bill 153. The combination of these two sets of revisions, identified below, represent Idaho's antidegradation implementation procedures that were revised under Idaho law.

1) 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);

2) 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 revisions to its water quality standards administrative rule and revisions to Idaho water quality statute to the U.S. Environmental Protection Agency (EPA) for review and action. Together, these revisions, along with the existing provisions in Idaho's 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. The State of Idaho had previously adopted an antidegradation policy in its regulations.

On August 18, 2011, the EPA reviewed and acted on the water quality standards revisions to the Idaho Administrative Code and Idaho Statutes that established Idaho's antidegradation implementation methods (Idaho docket 58-0102-1001). The EPA approved the revisions to the water quality standards rule (at Chapter 58.01.02, sections 10, 051, and 052 of Idaho Administrative Code) and the revisions to Idaho statute (sections 39-3601, 39-3602, and 39-3603 of the Idaho Code set forth in House Bill 153).

Idaho's antidegradation implementation methods found at Idaho Code §39-3603 include a provision that requires 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* §39-3603(2)(c),

Idaho Code, 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 §39-3603(2)(c)(i), Idaho Code, 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%)").*

On February 14, 2012, Greater Yellowstone Coalition challenged, in part, the EPA's approval of Idaho Code § 39-3603(2)(c) 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* April 24, 2013 Memorandum Decision and Order, *Greater Yellowstone Coalition v. EPA,* Case No. 4:12-cv-60 (D. Idaho).

Today, pursuant to section 303(c) of the Clean Water Act (CWA), the EPA is disapproving as a new or revised water quality standard Idaho Code § 39-3603(2)(c). The EPA is only acting on this provision and is not taking action on any other provisions that were previously approved on August 18, 2011. The EPA also notes that on June 8, 2012, IDEQ submitted revisions to the Idaho water quality standards rule to make the language on implementation of antidegradation consistent with the legislative language from House Bill 153. One revision included in that submission is the addition of Chapter 58.01.02.052.08.a, which requires the State of Idaho to deem insignificant (*i.e., de minimis*) any change in activity or discharge that will not cumulatively decrease assimilative capacity by more than 10% (Idaho docket 58-0102-1103). The EPA has not yet acted on that submission and is not acting on that submission today. However, when the EPA acts on that submission, the EPA intends to act on the addition of the *de minimis* provision into Idaho's rules consistent with today's decision.

EPA's Antidegradation Regulations and Guidance

The EPA's water quality standards regulation at 40 CFR § 131.12(a) requires that state-adopted water quality standards include an antidegradation 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 certain federal standards contained in 40 CFR § 131.12(a)(1)-(4). These federal standards establish three levels of water quality protection: Tier 1, Tier 2, and Tier 3.

For Tier 1, the state or tribe's antidegradation policy must provide protection for all existing 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." *Id.* § 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 or tribe. *Id.* § 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 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." *Id.* This Tier 2 standard protects the water body's "assimilative capacity," which is the amount by which the water body exceeds the quality necessary to support its designated uses.

The text of 40 CFR § 131.12(a)(2) does not provide directly for *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." *Kentucky 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* exemptions are permissible under EPA's antidegradation regulations. *See, e.g., Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732, 769 (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. *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.[1]

[1] *See* EPA Region V Guidance for Antidegradation Policy Implementation for High Quality Waters (Dec. 1986) , page 5 (http://water.epa.gov/scitech/swguidance/standards/adeg/upload/Region5_antideg_guidance.pdf); EPA Region I Guidance for Antidegradation Policy Implementation for High Quality Waters (March 1987),

The *de minimis* 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),[2] 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.[3] As with the 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*

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pages 5-6 (http://water.epa.gov/scitech/swguidance/standards/adeg/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/adeg/upload/Region9_antideg_guidance.pdf).

[2] Available at: http://www.epa.gov/gliclear/docs/usepa_sid.pdf.

[3] U.S. Environmental Protection Agency Memorandum, "Tier 2 Antidegradation Reviews and Significance Thresholds," from Ephraim S. King, Office of Science and Technology, to Water Management Division Directors, Region 1-10 (Aug. 10, 2005), available at: http://water.epa.gov/scitech/swguidance/standards/adeg/upload/tier2.pdf.

> *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

Today, the EPA is disapproving Idaho Code § 39-3603(2)(c) as a new or revised water quality standard because, in at least some cases, this provision could require Idaho to deem insignificant, and therefore exempt from Tier 2 review, certain proposed activities or discharges involving bioaccumulative pollutants even though such activities or discharges may cause significant degradation. The EPA is acting under authority provided in 33 U.S.C. §1313(c)(3) and 40 CFR Part 131.

Rationale for the EPA's Disapproval

The EPA has concluded that Idaho Code § 39-3603(2)(c) should be disapproved as a new or revised water quality standard because it *requires* Idaho 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%. The EPA's view is that even a seemingly small discharge of a bioaccumulative pollutant may, in fact, ultimately cause significant degradation. The EPA has concluded that because Idaho Code § 39-3603(2)(c) requires Idaho to exempt every discharge or activity involving a bioaccumulative pollutant that meets its "insignificance" test from Tier 2 review, without the ability to consider such discharges or activities on a case-by-case basis, Idaho could be required to use the provision where the proposed activity or discharge would not be truly insignificant, or *de minimis*.

The term "bioaccumulative pollutants" refers to substances that are persistent or long-lived (*i.e.*, they do not break down easily into other less harmful substances), mobile (*i.e.*, they transfer easily among different media and can be transported long distances), soluble in fats (*i.e.*, they tend to partition and remain in body tissue), and biologically active (*i.e.*, they interact and interfere with molecular processes in cell tissue, typically causing adverse reproductive and other effects). Because of these properties, these substances accumulate in body tissue at several times the concentration that they appear in associated water, and then further accumulate in higher trophic levels through biomagnification. It is not unusual for a highly bioaccumulative pollutant to accumulate a hundred-fold or more from water to plankton species, then again from two to ten-fold or more at each trophic step from small fish to bigger fish to birds and mammals, with a cumulative effect of up to hundreds or a thousand times its associated water concentration. Recipient organisms either have no biological mechanism to sequester or eliminate the pollutant (as is often the case with pesticides or other synthetic organic compounds) or existing mechanisms are overwhelmed at these high concentrations (as is often the case with heavy metals). The resulting toxic effects can include cancers, impaired neurological development, and reproductive failures in fish, birds, and mammals (including humans).

In the "Water Quality Guidance for the Great Lakes System Proposal," 58 FR 20802, 20905 (April 16, 1993), the EPA cited concerns about bioaccumulative chemicals of concern (BCCs)

when determining what constitutes significant degradation. "BCC" is a term specific to the Great Lakes System and is defined as "any chemical that has the potential to cause adverse effects which, upon entering the surface waters, by itself or as its toxics transformation product, accumulates in aquatic organisms by a human health bioaccumulation factor greater than 1000, after considering metabolism and other physicochemical properties that might enhance or inhibit bioaccumulation, in accordance with the [Methodology for Deriving Bioaccumulation Factors]." *See* 40 CFR § 132.2. The EPA's Great Lakes System Proposal stated:

> *EPA is concerned that any increase in the rate of mass loading of a BCC has the potential to significantly lower water quality because such substances accumulate in the biota, do not readily degrade and often result in adverse effects at concentrations well below those that can be accurately measured in the ambient environment.*

In 1998, the EPA's "A Multimedia Strategy for Priority Persistent, Bioaccumulative, and Toxic (PBT) Pollutants" (PBTs) [4] noted that the Agency's challenge in reducing risks from PBTs "stem[s] from the pollutants' ability to travel long distances, to transfer rather easily among air, water, and land, and to linger for generations" in people and the environment. Aquatic organisms can accumulate chemicals in their bodies when they are exposed to these chemicals through water, diet, and other sources. The extent of bioaccumulation by aquatic organisms varies widely depending on the chemical, the waterbody, water chemistry, and the species, but it can be extremely high for some highly persistent and lipid-soluble chemicals. For such highly bioaccumulative chemicals, concentrations in aquatic organisms may pose unacceptable human health risks from eating fish and shellfish even when concentrations in water are too low to cause unacceptable health risks from drinking the water.

The term "assimilative capacity" is typically used to refer to a body of water's capacity to receive discharges of pollutants without damage to living organisms that dwell in or consume the water. This concept is most useful in relation to substances that degrade in water and do not significantly accumulate in living tissue, such that a comparison of resulting concentration to specific objectives is relatively stable in a temporal and spatial context. While certain regulatory authorities establish such objectives for persistent, bioaccumulative, and toxic pollutants, the long-term potential for continued exposure to, and subsequent risk from, such pollutants warrants an extra degree of caution when contemplating a purposeful new discharge into the environment. In a risk assessment context, the term *de minimis* means a level of risk too small to raise concern. The nature of bioaccumulative substances indicates that such a blanket conclusion is inappropriate for even small levels of discharges. While the EPA has long recognized concern for any level of discharge of bioaccumulatives in areas of long water residence times (such as closed basins and the Great Lakes), as discussed further below, recent actions reflect the conclusion that this concern is more generally warranted.

The EPA acknowledges that it previously approved state-adopted *de minimis* antidegradation provisions (in Idaho and elsewhere) and in one case defended an approval of a state's non-

[4] Available at: http://www.epa.gov/pbt/pubs/pbtstrat.htm#I.

discretionary *de minimis* provision that applied automatically to bioaccumulative pollutants, as well as non-bioaccumulative pollutants. In *Ohio Valley Environmental Coalition v. Horinko*, 279 F.Supp.2d 732 (W.Va. 2003), the U.S. District Court for the Southern District of West Virginia upheld EPA's approval of a provision that allowed a 10% reduction in assimilative capacity from an individual discharge as *de minimis*, *i.e.*, not triggering Tier 2 antidegradation review. *Horinko*, 279 F.Supp.2d at 770. The plaintiffs in that case cited statements from the Great Lakes System rulemaking, *see* 60 FR 15365 (Mar. 23, 1995), about the special concerns presented by BCCs. *Id.* (citing Water Quality Guidance for the Great Lakes System SID). In *Horinko*, the Court concluded that statements in the Water Quality Guidance for the Great Lakes System about the impropriety of a *de minimis* exemption for BCCs in the Great Lakes System were made based on the unique ecosystem that exists in the Great Lakes, and thus did not apply to West Virginia. As discussed more fully below, more recently the EPA has reevaluated its position on whether and how bioaccumulative pollutants should be addressed in a state's *de minimis* antidegradation provision outside of the Great Lakes.

In the last several years, the EPA has taken steps to address bioaccumulative pollutants and to explore more opportunities to minimize their impacts on the environment both in the United States and abroad. In 2010, the EPA promulgated a rule to limit emissions of mercury and other toxics from Portland cement plants. 75 FR 54969 (Sept. 9, 2010). In 2012 and 2013, the EPA promulgated rules called the Mercury and Air Toxics Standards, which provide limits on emissions of mercury and other toxic pollutants from new and existing power plants. 77 FR 9304 (Feb. 16, 2012); 78 FR 24073 (Apr. 24, 2013). The EPA has also been involved in recent international negotiations to establish a legally binding convention directed at reducing mercury emissions to the air from power plants and other sources, as well as the use of mercury in products and industrial processes.[5] The text of the convention was adopted by delegates from more than 140 countries on January 19, 2013.[6] Finally, on June 7, 2013, the EPA published a proposed rule that would reduce discharges of certain bioaccumulative and toxic metals, including mercury, selenium, and arsenic from power plants into the nation's rivers, lakes, and streams. 78 FR 34431. Steam electric power plants constitute the largest source of toxic metal pollutant discharges into water bodies by all industrial categories currently regulated in the United States.

The EPA took into consideration these developments and other information when the issue of how bioaccumulative pollutants should be addressed in Idaho's antidegradation *de minimis* provision was raised in *Greater Yellowstone Coalition v. EPA*, Case. No. 4:12-cv-60 (D. Idaho). As a result of the court proceedings and a remand of this issue, during which the EPA received additional information from litigants and stakeholders, the EPA has been in a position to reevaluate the appropriateness of approving a non-discretionary antidegradation *de minimis*

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[5] *See* Report of the intergovernmental negotiating committee to prepare a global legally binding instrument on mercury, available at: http://www.unep.org/hazardoussubstances/Mercury/Negotiations/INC5/INC5Report/tabid/3496/Default.aspx.

[6] *See* Draft Minamata Convention on Mercury, available at: http://www.unep.org/hazardoussubstances/Mercury/Negotiations/INC5/INC5Report/tabid/3496/Default.aspx.

provision that automatically applies to bioaccumulative pollutants. *See* April 24, 2013 Memorandum Decision and Order, *Greater Yellowstone Coalition v. EPA,* Case No. 4:12-cv-60 (D. Idaho). The Tier 2 review process furthers Congress' objective "to restore and *maintain* the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). Tier 2 review allows for the public to evaluate whether a proposed activity or discharge justifies the degradation of a high quality water, which is a valuable public resource. In light of the special characteristics of bioaccumulative pollutants, as described above, discharges or activities involving such pollutants should not automatically be considered "insignificant" and thus excluded from the public Tier 2 evaluation process. The EPA's view is that, for discharges of such pollutants, a Tier 2 review may be appropriate to ensure that all feasible alternatives that might prevent or minimize even relatively small levels of additional discharges of bioaccumulative pollutants are evaluated, and to ensure that any additional lowering of water quality from bioaccumulative pollutants is associated with important social and economic development. Therefore, the EPA would expect Idaho to carefully consider any proposed lowering of water quality by bioaccumulative pollutants before determining that such lowering would be insignificant.

In addition, bioaccumulative pollutants are present in Idaho's waters and water quality concerns regarding bioaccumulative pollutants have been identified within the State, including in association with mining activities. For example, a 2008 statewide assessment of selected bioaccumulative pollutants in fish tissue from Idaho lakes and reservoirs showed that 40% of lakes sampled and 30% of composite fish samples had an average mercury concentration in fish tissue greater than the statewide human health standard.[7] Furthermore, in its 2010 Integrated Report, Idaho reported 22 waterbodies listed for mercury impairment, covering 117,280 lake/reservoir acres and 310 stream miles, as well as 22 waterbodies listed for selenium impairment, covering 151 stream miles. [8] Mercury is the leading cause of impairment for lakes and reservoirs.[9]

Because of the non-discretionary nature of Idaho Code § 39-3603(2)(c) and the EPA's concerns identified above regarding bioaccumulative pollutants, the EPA is disapproving Idaho Code § 39-3603(2)(c) as a new or revised water quality standard, pursuant to 33 U.S.C. §1313(c)(3) and 40 CFR Part 131. As previously noted, in at least some cases under the State's provision, Idaho could be required to exempt from Tier 2 review certain changes in water quality from proposed activities or discharges involving bioaccumulative pollutants that may cause significant degradation. As a result of today's disapproval, there is no *de minimis* provision in effect for CWA purposes when implementing the antidegradation water quality standard in Idaho. This decision does not constitute a prohibition against the lowering of water quality for bioaccumulative pollutants. Rather, proposed lowerings of water quality that would have been

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[7] "Arsenic, Mercury, and Selenium in Fish Tissue from Idaho Lakes and Reservoirs: A Statewide Assessment" (May 2008), page 1 (http://www.deq.idaho.gov/media/639760-arsenic_mercury_fish_tissue_report_0508.pdf).

[8] *See* Idaho's 2010 Integrated Report (August 2011), available at: http://www.deq.idaho.gov/media/725927-2010-integrated-report.pdf

[9] Available at: http://www.deq.idaho.gov/media/714423-2010-integrated-report-map.pdf.

deemed insignificant (*i.e.*, *de minimis*) degradation in accordance with Idaho Code § 39-3603(2)(c) can be authorized if, after completion of a Tier 2 review, Idaho finds that such lowering is necessary to accommodate important economic or social development in the area in which the waters are located. In developing today's decision and the rationale supporting it, the EPA's Region 10 has coordinated closely with the EPA's Office of Water.

Options for Resolving the Disapproval

There are several approaches that can be considered by IDEQ to remedy the EPA's disapproval and establish water quality standards that meet CWA requirements, including the following:

- Delete Idaho Code § 39-3603(2)(c) and instead indicate that all proposed activities to lower water quality for all pollutants including bioaccumulative pollutants are subject to antidegradation Tier 2 review requirements.

- Revise Idaho Code § 39-3603(2)(c) with respect to how it applies to proposed activities that would lower water quality by bioaccumulative pollutants. For example, the provision could be modified to exempt proposed activities that would result cumulatively in no more than 10% loss of assimilative capacity from Tier 2 review, provided that, in no case, will a lowering of water quality for bioaccumulative pollutants be deemed "insignificant." This approach would not prohibit the lowering of water quality for bioaccumulative pollutants; instead, every proposed new or increased discharge of a bioaccumulative pollutant would require a Tier 2 review and Idaho would need to find that any associated lowering of water quality is necessary to accommodate important economic or social development in the area in which the waters are located.

- 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.