UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER AND WATERSHEDS

April 21, 2015

Don Essig
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706

RE: EPA's Comments on Idaho's Preliminary Draft #1 Negotiated Rule - Docket No. 58-0102-1501, Designating and Revising Uses, Manmade Waterways, and Private Waters

Dear Don:

EPA appreciates the opportunity to provide comments to the Idaho Department of Environmental Quality (DEQ) on the preliminary draft negotiated rule language, which DEQ presented at the April 7, 2015 negotiated rulemaking meeting on Designating and Revising Uses, Manmade Waterways, and Private Waters. EPA appreciates DEQ's efforts to revise and develop new rule language for designating and revising uses. EPA is providing our detailed comments on the preliminary draft rule in the enclosure.

We understand that DEQ may consider holding another rulemaking meeting. EPA believes an additional meeting could be beneficial, particularly if stakeholders have clarifying questions and would like further discussion on EPA's enclosed comments. For example, EPA has heard that some stakeholders may not be aware that EPA believes specific elements of the preliminary draft revisions regarding undesignated, manmade waterways and private waters appear to codify an interpretation of the original provisions that is not consistent with the applicable Clean Water Act requirements. EPA is interested in working with DEQ and the stakeholders to address these and other specific issues identified in the attached comments.

In addition, during the April 7 meeting, EPA heard several comments regarding the issue of waters of the U.S. While EPA believes these issues are not directly applicable to the scope of this rulemaking, which is focused on applicable Clean Water Act requirements that would apply to waters of the U.S., we understand that there may be an interest in clarifying if all manmade waterways would be considered waters of the U.S. EPA is available to participate in those discussions and interested in what additional information EPA could provide that may be helpful to stakeholders on this subject.

I appreciate the opportunity to provide you with EPA's comments and look forward to continued work with DEQ on this effort. If you have any questions or would like to discuss these comments further, please contact me at (206) 553-1834.

Sincerely,

Lisa Macchio
Water Quality Standards Coordinator

Enclosure

EPA's Comments on Idaho's Preliminary Draft #1 Negotiated Rule - Docket No. 58-0102-1501, Designating and Revising Uses, Manmade Waterways, and Private Waters

Man-made waterways

EPA recommends that DEQ explain how its draft revisions to the "nondesignated surface waters and man-made waterways" provisions are consistent with the Clean Water Act. The preliminary draft revisions appear to codify an interpretation of the original provisions that is not consistent with the applicable Clean Water Act requirements as EPA has explained in recent permit actions. EPA expects states to apply CWA section 101(a)(2) "national goal" uses of fishable/swimmable to all waters of the U.S., including man-made waterways that are waters of the U.S., unless a Use Attainability Analysis (UAA) is completed to determine if those uses are not feasible and an alternate use, such as agricultural water supply alone, would be appropriate.

EPA is available and interested in working with DEQ to develop water quality standards revisions that would clarify what designated uses apply to man-made waterways, recognizing that designated uses other than the CWA section 101(a)(2) "national goal" uses of fishable/swimmable may be appropriate in certain circumstances. EPA also acknowledges the importance of considering a number of factors, such as similarities and differences amongst these waterways, when developing a State approach for how to define and designate appropriate uses in a timely and efficient manner. Region 10 is available to assist DEQ in developing this approach.

Private Waters

As you are aware, there is federal rule in place which is still applicable for Idaho with respect to private waters (referred to in the federal rule as "excluded" waters 40 CFR 131.33(c)).

The federal rule reads:

"Lakes, ponds, pool, streams, and springs outside public lands but located wholly and entirely upon a person's land are not protected specifically or generally for any beneficial use, unless such waters are designated in Idaho 16.01.02.110 through 160., or, although not so designated, are waters of the United States as defined at 40 CFR 122.2."

The preamble to the proposed federal rule states that EPA disapproved Idaho's private waters provision because it excluded those unclassified (now referred to as undesignated) waters which are "outside public lands but located wholly and entirely upon a person's land" from water quality standards. Since it is possible that some waters "located wholly and entirely upon a person's land" could be waters of the U.S, EPA explained that a federal promulgation was necessary because all waters of the United States must be protected by water quality standards. (FR Vol 62 No.81 April 28, 1997 pg. 23015). EPA also stated that the federal rule was being promulgated to ensure that, if such waters are waters of the United States, these waterbodies would receive the protection afforded other unclassified waters, i.e., cold water aquatic life and recreation[1]. *See* 62 Fed. Reg. 23014 & 41176.

[1] Idaho's provision at 101.01 was at that time labeled "unclassified", today 101.01 is labeled as "undesignated"

In the preamble to the final rule, EPA further clarified its position by explaining that "to the extent that any "private" waters are waters of the United States, and a regulated person has information indicating that cold water biota is not an appropriate use, he may present information to the state and ask for a determination that another use is more appropriate." 62 Fed. Reg. 41177 (July 31, 1997).

In summary, DEQ's preliminary draft rule language regarding private waters is not consistent with the federal rule. Therefore, if Idaho adopts the preliminary draft rule revisions, it is unlikely that EPA would withdraw Idaho from the federal rule for excluded/private waters.

102. Designation and Revision of Beneficial Uses

102.01(a)(iv): EPA believes that it is important for DEQ to clarify that DEQ will complete a UAA pursuant to 40 CFR 131.10(j)(1) if it is determined that a CWA Section 101(a)(2) use is not appropriate based on economic costs. This interpretation would be consistent with the Clean Water Act and its implementing regulations. EPA suggests DEQ include a statement that clearly states a UAA would be required when making a demonstration based on economic factors.

102.02(d): Consistent with EPA's interpretation of 40 CFR 131.10(j), a state is required to conduct a UAA whenever it designates/has designated uses that do not include the uses specified in section 101(a) (2) of the Act. This means a UAA is required if a state is only designating non-101(a) (2) uses, e.g., a public water supply use or an agricultural water supply use. It also means that a UAA is required if a state is only designating a limited aquatic life use and not a "full" aquatic life use. However, the draft text in 102.02(d)(i) can be read to imply that a UAA would not be required if the State is only designating a limited aquatic life use (or only designating a secondary contact recreation use), because it could be argued that a limited aquatic life use (or secondary contact rec use) "includes" aquatic life (or recreation). This interpretation would not be consistent with 40 CFR 131.10(j). EPA recommends that DEQ use the phrase "The Department acts to remove a designated use that is specified in section 101(a)(2) of the Act....", similar to EPA's language in 40 CFR 131.10(j).

102.02(d)(ii): This text captures all the appropriate scenarios for when a UAA would be required. However, DEQ should clarify that wildlife uses are included in 101(a)(2) in addition to aquatic life and recreation uses. As with 102.02(d) above, EPA recommends that DEQ use the phrase "The Department acts to remove a designated use that is specified in section 101(a)(2) of the Act..." similar to EPA's language in 40 CFR 131.10(j).

102.02(e): EPA provides the same comments as above with regards to the "aquatic life and recreational uses" language. One could read 102.02(e)(i) as implying that a UAA is not required when designating a limited warmwater fishery, because such a use "includes" aquatic life. This is not consistent with 40 CFR 131.10(j). EPA suggests addressing this by simply referring to "the uses specified in section 101(a)(2) of the CWA" instead of saying "aquatic life and recreational uses."