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August 20, 2015

Paula Wilson
IDEQ State Office
Attorney General's Office
1410 N. Hilton
Boise, ID 83706

RE: Docket No. 58-0102-1201 - Negotiated Rulemaking
Fish Consumption Rule Making Meeting – August 6, 2015

Dear Ms. Wilson:

Clearwater Paper is pleased to offer this comment letter on the subject rulemaking. We appreciate the Idaho Department of Environmental Quality's (IDEQ) work on this very important matter and look forward to our continued participation in this rulemaking process.

We are offering some specific comments on the materials offered in the August 6, 2015, rule making meeting. Our positions on these important matters is also largely reflected in the comment letter of Idaho Association of Commerce and Industry (IACI) and we fully support IACI's comment letter.

Protectiveness of Criteria/Anti-Backsliding

Based on materials presented associated with the subject meeting, some of the pollutants and associated HHWQC criteria would numerically increase based on Idaho Department of Environmental Quality (IDEQ) proposed risk management decisions and/or based on EPA's 2015 Recommended Criteria. However, IDEQ has not made such adjustments based on its policy preference to "improve human health protection in the future." We believe this policy is misplaced, not based on sound science, not required by the Clean Water Act and as such is contrary to Idaho law.

At some of the rule-making meetings, IDEQ's policy to not "relax" any criteria has been referred as an anti-backsliding policy. This is an incorrect characterization. Anti-backsliding is a well-established principal under the Clean Water Act. It prohibits the relaxation of NPDES permit limits when a permit is renewed or reissued unless certain limited exceptions apply. *See* 33 USC §§ 1313(d)(4) and 1342(o). Anti-backsliding does not apply to relaxation of the underlying water quality standards based on best available science. In fact, federal regulations inform states that water quality criteria must be based on sound scientific rationale. 40 CFR § 131.10(a)(1). It is not unusual for EPA or states to change (in this case increase) numeric criteria based on new and better science with the net effect of ***maintaining the same stringency***. If IDEQ's scientific rationale and risk management decisions suggest that many of the criteria pollutants should be numerically increased, then IDEQ must revise the criteria accordingly. It is incorrect, inconsistent and flawed public policy to apply sound science to only some criteria (when it makes the criteria more "stringent") yet ignore the equivalent science when promulgating other criteria.

We appreciate IDEQ's sentiment to "improve human health in the future" but we question how IDEQ is accomplishing that goal by ignoring the best available science, which dictates that the previous criteria are now not consistent with the state's risk policy choices. The logical conclusion to IDEQ's proposed policy preference is that once a standard is in place (even if it is no longer scientifically supportable) then it can never be changed because human health in the future will supposedly not be improved. We believe the better policy here should be to apply the same scientific approach to all pollutants. This policy is also supported by the dictates of state law that limits IDEQ's discretion in this instance. First, it is well established that IDEQ cannot pass water quality rules that are more stringent than minimum federal requirements promulgated by EPA. *See* Idaho Code § 39-3601. We believe EPA's National Recommended Criteria and the science used by IDEQ to develop the proposed human health criteria meet the minimum federal requirement threshold in Idaho Code. Accordingly, should IDEQ reject amending the criteria in the face of contrary recommendations from EPA or application of the best science required under the Clean Water Act, we believe it runs afoul of the no more stringent directive from the Idaho Legislature. Secondly, the Idaho Legislature has directed IDEQ to use the best available science when promulgating rules. *See* Idaho Code § 39-107D(2)(a). State law does <u>not</u> stipulate that IDEQ must only use the best science when it results in more stringent criteria and ignore the same scientific approach if it results in making criteria less stringent. In fact we cannot find any support in state law for IDEQ's proposed policy of improving human health in the future by never changing the standards unless it is making them more stringent. IDEQ embarked on this rule-making a number of years ago under the premise that the agency was going to collect defensible data and apply the best available science in developing new human health criteria. We believe the subject policy is contrary to the intent of the rule-making as well as state law and urge IDEQ not to apply this policy in setting human health criteria in the subject rule.

In summary, basing public policy on the best available science is not the equivalent of a one-way street.

Public Health Protection Goals

In response to the December 2014 rulemaking meeting, ARCADIS submitted a white paper to IDEQ describing considerations and background information that should be considered when setting HHWQC (ARCADIS, January 20, 2015). Central to those considerations was the recognition that risks vary among different members of the population, if for no other reason than we all eat different amounts and kinds of fish. This recognition has been acknowledged repeatedly by the Department in rulemaking meetings. Faced with this variation, public health policy makers must make decisions about the level of protection afforded different segments of the population (e.g., the average member of the population, more highly exposed individuals, highly exposed subpopulations). In its 2000 AWQC guidance, USEPA recognizes this variation in potential risk and provides guidance on how to address it (USEPA 2000). That guidance states:

> "With AWQC derived for carcinogens based on a linear low-dose extrapolation, the Agency will publish recommended criteria values at a 10^{-6} risk level. States and authorized Tribes can always choose a more stringent risk level, such as 10^{-7}. EPA also believes that criteria based on a 10^{-5} risk level are acceptable for the general population as long as States and authorized Tribes ensure that the risk to more highly exposed subgroups (sport fishers or subsistence fishers) does not exceed the 10^{-4} level."

A range of risk between $1x10^{-6}$ and $1x10^{-4}$ is consistent with the range of risk USEPA considers to be acceptable in its hazardous waste programs and is also generally consistent with the range of risks used by many state regulatory agencies. For example, it is consistent with the allowable risk levels used by Florida in establishing their draft AWQC derived using probabilistic methods (FDEP 2014).

In its comments ARCADIS (2015) used readily available information about the population size of Idaho in 2012 and causes of death in Idaho to estimate how the number of cancers expected in Idaho might change assuming different cancer risk management goals. Applying a $1x10^{-5}$ allowable excess lifetime cancer risk management goal to the average Idahoan had associated with it an increase of 0.23 cancers per year. If one conservatively equates cancer incidence with cancer mortality that would mean a change from 2570.00 to 2570.23 cancers per year in Idaho in 2012. (Equating cancer incidence and mortality is conservative because many cancers are not fatal.) It would take between 4 and 5 years for even one increased cancer to occur in Idaho using such a risk management goal. If the State were to protect the average Idahoan at $1x10^{-6}$ excess lifetime cancer risk, the increase in annual cancer incidence would be 0.023 cancers. It would take about 43 years to see one additional incidence of cancer in Idaho from a water quality criterion based on a $1x10^{-6}$ risk management goal applied to the average Idahoan. In those 43 years more than 110,000 cancer deaths from other causes would have occurred. It bears noting that the State is currently proposing to apply the $1x10^{-6}$ risk management goal to the 95th percentile of the general population. That is an even more stringent benchmark than used in either of the above examples. The State's currently proposed risk management goal results in the average Idahoan having an excess lifetime cancer risk of about $3x10^{-7}$ (it varies slightly between chemicals) or, about an increase of 0.007 cancer incidences per year. It will take more than 140 years to observe one extra cancer incidence from the State's currently proposed risk management goal and in those 140 years more than a 300,000 Idahoans will have died from cancer from other causes.

The differences in state-wide cancer incidence associated with the range of risk management benchmarks discussed above are not meaningful from the point of view of reducing cancer incidence in Idaho: they are not measurable. However, because the more stringent risk management benchmarks lead to more stringent criteria that lead to increased compliance costs, they require the State and its citizens to allocate resources towards compliance with criteria that have no meaningful health benefit and away from other actions that can result in meaningful cancer risk reduction. In other words, the risk management benchmarks the State is proposing to use to establish human health water quality criteria will have the opposite of the intended outcome. They will hurt rather than improve public health by wasting private and public resources. We strongly urge the State to reconsider the proposed cancer risk management goals and use the discretion provided by EPA's guidance in selecting risk management goals and develop criteria that protect the average Idahoan at a $1x10^{-5}$ or a $1x10^{-6}$ excess lifetime risk management goal and verify that highly exposed Idahoan at less than $1x10^{-5}$. As shown by ARCADIS (2015) such criteria are protective when compared to other regulatory programs and when compared to other common causes of mortality.

Both public and private resources are limited and the proposed IDEQ risk policy choices will result in a serious misallocation of future resources by municipalities and industrial dischargers in Idaho. Compliance with future TMDL's and permit limits based on the types of risk profiles described above is not attainable and represents unacceptable public policy. We strongly urge IDEQ to revise their risk management decisions on both carcinogens and non-carcinogens (best available science for RSC values and not a default value of 20 percent) to those allowable under EPA guidance. Also, as referenced above going beyond federal stringency requirements is not consistent with Idaho law.

Protection of Downstream Waters

In the last version of the Preliminary draft rule, IDEQ has proposed a new policy on how the agency will generally apply the standards to the protection of downstream waters. It appears that IDEQ's proposal was taken from a number of recently circulated EPA suggested templates on the topic. The templates appear to be derived from the federal water quality rule that describes what factors states should take into consideration in adopting designated uses and associated criteria. *See* 40 CFR § 131.10(b). We have a number of concerns about IDEQ's proposal. First we question the necessity for this proposal. Presumably, EPA will review adoption of new designated uses and associated criteria by applying 40 CFR 131.10(b) to such a review. We fail to see how IDEQ's proposed provision adds any clarity to 40 CFR 131.10(b). In fact, it appears to potentially expand the scope of the federal rule by applying the downstream water policy to any implementation of Idaho's standards and not just the designated use process referenced in the federal rule. Clearwater Paper believes if some type of downstream water protection provision is necessary, it should simply state that IDEQ will protect downstream waters consistent with the Clean Water Act.

Another concern with the proposal is that it introduces new and undefined terms into Idaho rules. The terms "maintenance" and "attainment" downstream standards as well as "pour point" are not defined. Do these terms suggest that an upstream water cannot contribute any additional pollutants into a downstream water? If that is the intent of the proposal it will be impossible to achieve compliance. Does IDEQ intend to apply concepts such as mixing zones to this new standard? If so, this needs to be further explained in the new proposed standard.

Additionally, how will this new standard be applied to a situation in which the downstream standards currently exceed applicable criteria? Will the upstream water now need to achieve or indeed have better water quality than the downstream water to achieve this new standard? Also, how will this new standard be applied to the presence of legacy pollutants such as pesticides, PCBs or mercury in downstream waters? In the one instance that we are aware of that presented the legacy pollutant issue on the Mississippi River, EPA declined to require adoption of more stringent criteria in upstream states because the upstream waters were not causing the legacy pollutants in downstream waters. There is no such causation condition in IDEQ's proposed standard.

This new proposed standard also raises a number of questions about the application of standards to both intrastate and interstate waters. For intrastate waters, currently Idaho standards make clear distinctions on how various waters should be regulated such as reservoirs, ephemeral waters, manmade waters, domestic water supplies, warm water biota etc. The proposed standard has the potential to upset the carefully crafted distinctions in place under Idaho's standards for decades by requiring that all waters meet the most stringent criteria in downstream waters.

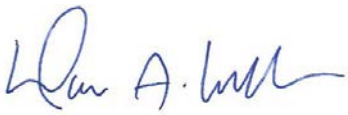
With respect to interstate waters or downstream state waters we believe the proposed standard is equally problematic. Under the Clean Water Act, clearly Congress granted each state a significant amount of discretion on how they choose to develop designated uses with associated criteria. Indeed the proposed human health criteria rule highlights the various risk management decisions that each state is authorized to exercise in adopting protective criteria for its citizens. If a downstream state or authorized Tribe chooses to adopt very stringent (and perhaps unattainable) criteria we question whether it is consistent with the intent of the Clean Water Act or even the United States Constitution that such criteria can be defacto imposed on an upstream state and its citizens.

The proposed protection of downstream standards provision raises many important public policy questions. **Therefore we propose that IDEQ withdraw this proposed standard for a separate negotiated rule-making.** Alternatively given the state sovereignty issues implicated by this new standard, it may be appropriate for this issue to be taken up by the Idaho Legislature. Currently Idaho law specifies the conditions IDEQ should consider in adopting designated uses and associated criteria. *See* Idaho Code § 39-3604. How IDEQ takes into consideration downstream intrastate and interstate water quality standards in setting state standards is not currently addressed under state law. Accordingly, the downstream protection issue could be addressed through amendments to Idaho code.

On behalf of Clearwater Paper, we appreciate the opportunity to provide comments on this important matter and look forward to participating with IDEQ as this rulemaking goes forward.

Please contact me at 509-344-5956 or marv.lewallen@clearwaterpaper.com with questions.

Sincerely yours,



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