IACI Idaho Association of Commerce & Industry
The Voice of Business in Idaho®

August 21, 2015

Ms. Paula Wilson
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706

Dear Ms. Wilson:

On August 6, 2015, the Department of Environmental Quality (Department) presented further information and proposed rule language for setting Human Health Water Quality Criteria (HHWQC) and performing calculations associated with fish consumption rates. The Idaho Association of Commerce & Industry (IACI) is the leading voice for Idaho business and has been an active participant in this rulemaking process. IACI has the following comments on the information and proposals made at this August meeting.

Criteria Need to Reflect Best Science

IACI recommends that the Department fully utilize the best science information and calculation methodology to determine new human health water quality criteria. This includes Idaho-specific bioaccumulation factors (BAFs), informed Relative Source Contribution (RSC) factors, and probabilistic risk assessment methodology. The resulting calculated values, along with appropriate risk management policy decisions, should be the basis for setting the criteria.

The Department needs to look carefully at whether information exists that warrants a change in the RSC factors for the pollutants, rather than using a default EPA factor of 0.2. Other states, such as Florida, have done work to calculate alternate factors. The Department should examine such information and evaluate if it is applicable to Idaho. Likewise, as data becomes available, the Department should calculate Idaho-specific BAFs. Such BAFs would better represent the aquatic systems here in Idaho rather than studies conducted in other locales.

The Department has stated that if using the new methodology, the resulting calculated criteria is less stringent (i.e., allowable concentration has increased), that the existing criteria would be retained. We believe this decision is misplaced, it is not required by the Clean Water Act, and as such is contrary to Idaho law.

At some of the rulemaking meetings, the Department's decision to not relax any criteria has been referred to as an "anti-backsliding policy." This is a misnomer. Anti-backsliding is a well-established principle under the Clean Water Act and implementing rules. 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.

Both federal rules and Idaho statute require the use of "sound" or "best" science in setting criteria. EPA rules for establishing water quality criteria state the following (see 40 CFR §131.11(a)(1)):

> States must adopt those water quality criteria that protect the designated use. Such **criteria must be based on sound scientific rationale** and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. [emphasis added].

The Idaho Legislature has directed the Department to use the best available science when promulgating rules (see Idaho Code § 39-107D(2)).

> 2) To the degree that a department action is based on science, in proposing any rule or portions of any rule subject to this section, the Department shall utilize:
>
> (a) The best available peer reviewed science and supporting studies conducted in accordance with sound and objective scientific practices; and
>
> (b) Data collected by accepted methods or best available methods if the reliability of the method and the nature of the decision justify use of the data.

Neither EPA's rules nor state law require that the Department must only use the best science when it results in more stringent criteria, but ignore the same science if it results in making criteria less stringent. We cannot find any support for the Department's proposed decision of improving human health in the future by never changing the standards unless it is making them more stringent. If the risk management decisions made by the Department and best scientific information used by the Department result in the new criteria being less stringent, the Department must revise the criteria accordingly. Otherwise, the Department is making arbitrary decisions on the setting of criteria.

The Department initiated this rulemaking with the approach of collecting Idaho-specific data and applying the best available science in determining new human health criteria. We believe the use of the Idaho fish consumption survey data in a probabilistic risk assessment methodology, adjusted RSC factors and Idaho-specific BAF will provide "sound science" to develop the new criteria. The Department needs to utilize the results of this methodology and not make an arbitrary decision that, even if the new calculated criteria is less stringent, then such values cannot be used.

Risk Policy Decisions

As discussed during this rulemaking, there is a recognition that risks vary among different members of the population; we all eat different amounts and kinds of fish. Faced with this variation, the Department 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). The EPA recognizes this variation in potential risk

and provides guidance on how to address it: (see EPA. 2000. Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health).

> "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}. USEPA 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."

Risk management decisions can have a great influence on criteria values; the level of protection needs to assure the protection of designated uses and not unrealistic risk scenarios. Risk thresholds need to accommodate that balance. Otherwise, the result will be criteria that exceed "background" or are otherwise unattainable, or nearly so, because of unrealistic thresholds. This would result in significant expenditures to meet criteria that provide minimal (at best) improvements for human or ecological health. As the Department makes decisions regarding RSC, "backsliding" and BAFs, IACI encourages the Department to reexamine the different levels of risk for different rates of fish consumption by different segments of the population.

Downstream Waters

The Department has proposed a new rule language on how the agency will apply the standards to the protection of downstream waters. IACI has a number of concerns about the Department's proposal, which are described in detail in the comments by Clearwater Paper Corporation. We recommend that this proposed language be withdrawn and that this issue be discussed in a future rulemaking.

We appreciate the opportunity to provide comments to the Department on this rulemaking. The extensive fish consumption study and other technical investigations the Department has conducted have provided important information for developing updated human health water quality criteria. IACI recommends that the Department fully utilize all best available technical information, and the accompanying risk management decisions reflect the flexibility provided in the Clean Water Act and provide meaningful public protection.

Sincerely,

Alex LaBeau
President

cc: Alan Prouty, Chair
IACI Environment Committee