UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER AND WATERSHEDS

August 28, 2015

Josh Schultz
1410 N. Hilton
Boise, Idaho 83706

RE: EPA's Comments on Idaho's Proposed Rule, Docket No. 58-0102-1501, Designating and Revising Uses

Dear Josh:

EPA appreciates the opportunity to provide comments to the Idaho Department of Environmental Quality (DEQ) on the proposed rule language for designating and revising uses. EPA has reviewed DEQ's proposed rule, dated August 5, 2015, and provides the enclosed comments for your consideration. EPA supports DEQ's ongoing efforts to add language to Idaho's water quality standards consistent with the federal regulations for designating and revising uses. In addition, EPA supports DEQ's commitment to develop guidance on Use Attainability Analysis and believes supplemental guidance to the rule language will be valuable.

EPA remains concerned that DEQ's proposed rule does not include language addressing highest attainable use. As stated in DEQ's summary for the proposed rule, the rationale for not including EPA's suggestions regarding highest attainable use at the time of Idaho's negotiated rulemaking was EPA's rule language was only proposed and not final. The final rule was signed by the EPA Administrator on August 5, 2015, and published in the *Federal Register* on August 21, 2015 (80 FR 51019). The final rule, at 40 CFR131.10(g), requires that: "States may designate a use, or remove a use that is *not* an existing use, if the State conducts a use attainability analysis as specified in 40 CFR 131.10(j) that demonstrates attaining the use is not feasible because of one of the six factors in this paragraph. If a State adopts a new or revised water quality standard based on a required use attainability analysis, the State shall also adopt the highest attainable use, as defined in 40 CFR 131.3(m)." Given the federal water quality standards regulatory revisions are final and provide clarity in rule regarding the concept of highest attainable use, EPA expects DEQ to revise its proposed rule language to incorporate this requirement. EPA believes clarification of the highest attainable use concept in rule would be helpful to the public, the regulated community, and to DEQ as it develops accompanying guidance on existing uses and use attainability analyses.

EPA supports DEQ's establishment of its workgroup on manmade waters and was encouraged by the first meeting on August 4, 2015. EPA understands that DEQ has requested the workgroup help develop an approach to addressing inconsistencies with DEQ's interpretation of the man-made waterways provision and applicable Clean Water Act requirements. EPA is supportive of the workgroup's efforts and will continue to provide EPA staff assistance. EPA continues to encourage DEQ to develop an approach for defining existing uses and designating appropriate

beneficial uses for these waters and understands that DEQ likely needs additional time to do so appropriately.

EPA will continue to encourage DEQ to address these concerns each time there is an opportunity to do so. EPA appreciates DEQ's commitment to continue working on revisions such that both the rule language and DEQ's interpretation of these provisions are consistent with the Clean Water Act and the federal water quality standards regulations.

EPA remains committed to supporting the State's process and I 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 Proposed Rule
Docket No. 58-0102-1501
Designating and Revising Uses
August 28, 2015

010. Definitions

EPA reiterates its comments made in its April 21 and June 18, 2015 letters. EPA recommends DEQ include a definition of highest attainable use (HUA) in its rule. EPA's final rule defines HAU at 40 CFR 131.3(m): "Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in §131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable." This definition was revised based on commenters' concerns that the proposed definition of HAU used terminology that would make it difficult for states and authorized tribes to adopt an HAU that would not be challenged by stakeholders. The final HAU definition includes specific terms to ensure that the resulting HAU is clear to states, authorized tribes, stakeholders and the public.

Consistent with the federal water quality standards regulatory revisions at 40 CFR 131.3(m), EPA provides the following definition and recommends that DEQ include this definition in its final rule:

Highest attainable use - the modified aquatic life, wildlife or recreation use that is both closest to the uses specified in 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in 40 CFR 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.

101. Man-made waterways and Private waters

EPA understands that DEQ has decided not to revise Sections 101.01, 101.02 and 101.0 in this rulemaking because DEQ determined that additional time is needed to develop rule language to address manmade waterways consistent with the CWA and the regulatory requirements. As DEQ has acknowledged, the man-made waterways and private waters provisions are inconsistent with the CWA and the regulatory requirements. 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 and private waters 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 would be appropriate. EPA remains optimistic that DEQ will develop a path forward to address EPA's concerns with the manmade waterways provision and will develop rule language in a reasonable timeframe.

As EPA stated in its June 18th comment letter until Idaho adopts rule language consistent with EPA's federal rule regarding private waters, the federal rule remains in place (referred to in the federal rule as "excluded" waters 40 CFR 131.33(c)).

102. Designation and Revision of Beneficial Uses

102.01(a)(iv):

In its April 21 and June 18, 2015 comment letters, EPA suggested DEQ include a statement that clearly states a UAA will be required if it is determined that a CWA Section 101(a)(2) beneficial use is not appropriate based on economic factors. This interpretation would be consistent with the Clean Water Act and its implementing regulations. DEQ did not include this clarifying language in its revised rule. Regardless of whether DEQ adds this clarification, EPA expects that DEQ will still complete a UAA pursuant to 40 CFR 131.10(j).

102.02(d)(i):

The propose rule includes language that now makes it clear that a UAA must be conducted whenever DEQ designates beneficial uses that do not include uses specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.

102.02(d)(ii):

The proposed rule language clarifies that wildlife uses are included in 101(a)(2) in addition to aquatic life and recreation uses. As with 102.02(d)(i) above, the revised rule also includes language that makes it clear a UAA must be conducted whenever DEQ acts to remove a designated beneficial use that is specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.

102.02(e)(i):

DEQ has included language that now makes it clear that a UAA is not required whenever DEQ designates beneficial uses that are specified by CWA 101(a)(2) similar to EPA's language in 40 CFR 131.10(k). These revisions provide the necessary and appropriate clarification.

102.02(e)(ii):

As with 102.02 (e)(ii) above, DEQ has added language that makes is clear that a UAA is not required whenever DEQ removes beneficial uses that do not include those uses specified by CWA 101(a)(2). These revisions provide the necessary and appropriate clarification.

EPA reiterates the comment in its June 18, 2015 letter and recommends DEQ add a new provision at 102.02(f). The federal water quality standards regulatory revisions makes clear that once a state or authorized tribe has rebutted the presumption of attainability by demonstrating through a required UAA that a use specified in section 101(a)(2) of the Act is not attainable, it must adopt the highest attainable use (HAU). The preamble to the proposed rule also provides

several examples of how states and authorized tribes can articulate the HAU. These examples include using an existing designated use framework, adopting a new statewide sub-category of a use, or adopting a new sub-category of a use that uniquely recognizes the limiting condition for a specific water body (e.g., aquatic life limited by naturally high levels of copper). Some commenters expressed concern with the difficulty of articulating a specific HAU because doing so may require additional analyses. Where this may be the case, an alternative method of articulating the HAU can be for a state or authorized tribe to designate for a water body a new or already established, broadly defined HAU (e.g., limited aquatic life use) and the criteria associated with the best pollutant/parameter levels attainable based on the information or analysis the state or authorized tribe used to evaluate attainability of the designated use. This is reasonable because the state or authorized tribe is essentially articulating that the HAU reflects whatever use is attained when the most protective, attainable criteria are achieved. Where a state or authorized tribe does not already have a statewide use in their regulation that is protective of the HAU, the state or authorized tribe will need to find an approach that meets the requirements of the CWA and §131.10(g). States and authorized tribes are not limited by the examples described in this section and can choose a different approach that aligns with their specific needs, as long as their preferred approach is protective of the HAU and is consistent with the CWA and §131.10.

EPA recommends DEQ include clarifying language consistent with this requirement and add 102.02(f) and the following language:

102.02(f):

When adopting a new or revised designated use based on a required use attainability analysis the Department shall also adopt the highest attainable use (as defined in 010.xx)