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May 13, 2014

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

**RE: Docket No. 58-0102-1401 Negotiated Rulemaking  
Rulemaking initiated to updated mixing zone policy**

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 (IDEQ) work on this very important matter and look forward to participating as this rulemaking proceeds.

As IDEQ begins this important rulemaking, we offer the following specific comments to the preliminary draft negotiated rule (Draft No. 1):

*Proposed 060.01.a "Mixing zones shall not be authorized for a given pollutant when the receiving water does not meet water quality criteria for that pollutant."*

This language could create a significant disconnect in the compliance status of an authorized and compliant discharger when a receiving water gets added to a 303(d) list. Prior to the 303(d) listing, a discharger would be in compliance with their NPDES permit but when a 303(d) listing is finalized, the source could be immediately out of compliance with Idaho rules, subject to enforcement and third party litigation, all while complying with their discharge permit. We suggest this provision makes clear it only applies to existing discharges when a NPDES Permit is renewed. Also, the language, as proposed, also does not recognize the purpose of the TMDL process within the Clean Water Act. As the Department knows, the TMDL process is the mechanism whereby a water body is brought back into compliance with water quality criteria and generally carries pollutant loading reductions for point source dischargers. The proposed language short circuits the TMDL process and eliminate the allocation paradigm associated with establishing a TMDL. In other words, a source could be in compliance with the allocation specified in a TMDL developed to return a water body to non-impaired status but still require a mixing zone. We suggest this provision be modified to authorize discharges that are in compliance with a TMDL. Finally the prohibition does not recognize the distinction between non-conservative pollutants that dissipate (e.g. heat) and the discharge of conservative pollutants. We suggest this provision be qualified to allow a mixing zone for discharges of non-conservative pollutants.

*Proposed 060.01.d "Mixing zones shall not cause unreasonable interference with, or danger to, existing beneficial uses. Unreasonable interference with, or danger to, existing beneficial uses includes, but is not limited to, the following:*

We urge Department to consider updating the introductory language to *"Mixing zones shall not cause unreasonable interference with, or danger to, existing **designated** beneficial uses"*. This would rely on the current designations within the rule and not allow subjective review of each individual mixing zone. If the rule relied on the "designated beneficial use" definition within the rule, we do not believe it would be necessary to include subparts i through vii.

If the Department includes i through vii, the following comments are offered:

*i. Interference with fish passage, spawning, egg incubation or rearing.*

The term "interference" alone does not connote any scale or absolute level of impact. Consider substituting clarification language such as "Interference (beyond de minimus levels)" or "significant interference."

*ii. Jeopardy to Endangered Species Act listed species, or destruction or adverse modification to critical habitat.*

This language borrowed from Section 7 of the ESA, could be construed to intend that every mixing zone that Idaho may consider should be separately the subject of consultation by the federal wildlife agencies. Clearly, ESA consultation is not required on state actions. Further, there is no doubt that the federal services will have the opportunity to comment on every NPDES permit or mixing zone that Idaho authorizes so it's unclear what this languages adds to the proposed rule. As stated, the intent of the language is unclear and should be clarified or eliminated.

*iii. Heat in the discharge that causes thermal shock, instant lethality or loss of cold water refugia.*

The technical terms of "thermal shock, instant lethality and cold water refugia" do not appear to be defined in the draft rule. Rather than face future uncertainty and debate about what these conditions entail, we suggest the department eliminate their use or insert defining language on the threshold levels of these mixing zone attributes.

*iv. In determining whether a mixing zone will cause unreasonable interference with, or danger to existing aquatic life beneficial uses, the Department shall consider the bioaccumulative nature of the pollutants involved.*

While we understand and appreciate the Department's obligations to assess mixing zones, this language is confusing relative to what "unreasonable" is intended to mean. If receiving water is not impaired for a bioaccumulative pollutant, by definition mixing zone is not leading to an impairment condition. This proposed language appears to suggest that bioaccumulative pollutants are not properly regulated in Idaho's standards. We do not believe this to be the case, and moreover the stringency of bioaccumulative pollutant criteria should not be addressed in this mixing zone rule. We urge the Department to clarify the intent of this new requirement or eliminate it from the rule.

*v. Acute toxicity to aquatic life outside the zone of initial dilution.*

"Acute toxicity to aquatic life" is not defined in the rule. We suggest substituting the terms "Exceeding any acute water quality criteria"

*vi. Concentrations of pollutants that exceed Maximum Contaminant Levels at drinking water intake structures.*

No comments.

*vii. Interference with public swimming areas.”*

As noted in the above comments, “public swimming area” could be defined as any location where swimming is not specifically prohibited. We suggest clarifying what a “public swimming area” is relative to this rule. Also, “interference” is a fairly vague term. We suggest substituting “unacceptable impact” or similar concept that carries a threshold determination to make this rule clearer when implemented.

The natural conditions of receiving water are an important consideration when establishing and minimizing mixing zones. We suggest adding subpart as follows:

*vii. Background and/or natural conditions associated with the receiving water.*

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](mailto:marv.lewallen@clearwaterpaper.com) with questions.

Sincerely yours,

A handwritten signature in blue ink, appearing to read "Marv A. Lewallen".

Marv Lewallen  
Vice President – Environmental, Energy & Sustainability

C: Don Essig