



**IDAHO MINING ASSOCIATION**

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May 22, 2014

Paula Wilson  
Department of Environmental Quality  
Attorney General's Office  
1410 N. Hilton  
Boise, ID 83706

RE: Water Quality: Docket No. 58-0102-1401 - Negotiated Rulemaking  
Rulemaking to update mixing zone policy.

Dear Ms. Wilson:

The Idaho Mining Association has over 60 members and represents mining companies engaged in mineral exploration, development, processing and reclamation throughout the state of Idaho as well as companies that provide products and services to the industry. We appreciate the opportunity to provide comments on the draft mixing zone policy being proposed by the Department of Environmental Quality.

I attended the first negotiated rulemaking session as did representatives of several of our member companies. We were particularly gratified by DEQ's strong assurance that this rulemaking would not result in increased costs to the regulated community.

The mining industry takes its responsibilities to comply with state and federal water quality requirements and standards very seriously. With prices for the commodities we produce at near-term lows, we are particularly concerned about additional regulatory costs when not accompanied by commensurate environmental improvement. DEQ's vigorous commitment, repeated several

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times during the meeting, to updating its mixing zone rule without imposing additional costs was especially appreciated.

DEQ was asked why this rule was being updated now rather than last year or next year. The answer given was that staff resources weren't available previously because of other, more pressing regulatory initiatives undertaken by the department.

The Proposed/Temporary Administrative Rules Form submitted for this rulemaking indicates that "some parts of the current rule need to be revised in order to meet the intent of related policies" that have changed over the years. We believe it is essential that the need for the proposed revisions be more clearly delineated, explained and justified. We suggest DEQ specifically identify which parts of the rule have been deleted or added to address specific, enumerated changes that have been made in related policies.

The PARF also indicates "there has been an increasing interest in, and investigation of, the agency's methods for establishing mixing zones." It would also be helpful if DEQ more fully identified those who have expressed this increasing interest in, and investigation of, the agency's methods. Did such interest and investigation come from the regulated community? The Environmental Protection Agency? Other state agencies? Non-governmental organizations?

This additional clarity will likely be necessary to secure the legislative approval of the proposed rule, particularly if that approval requires statutory enactment. If the primary reason to proceed with these changes now is simply bureaucratic convenience, our task of securing approval may be more difficult.

Here are our specific comments on the provisions discussed at the initial negotiated rulemaking meeting:

**060.01. Mixing Zones for Point Source Wastewater Discharges.**

We believe the existing statement of how DEQ will determine the applicability of a mixing zone and its size, configuration and location was very clear and provided the department with sufficient flexibility to tailor mixing zones to specific conditions on a case-by-case basis. Replacing this statement with descriptions of situations that constitute "unreasonable interferences with, or dangers to existing beneficial uses" does not provide clarity because they are modified by the phrase "includes, but not limited to. . ." In fact, the situations listed lack sufficient specificity to be of any value to a discharger in determining whether or not the particular situation exists.

For example, the proposed language states that any interference with fish passage, spawning, egg incubation or rearing, regardless of magnitude or severity, constitutes, by rule, “unreasonable” interference. Jeopardy to Endangered Species Act listed species or “adverse modification to critical habitat” would constitute, by rule, “unreasonable interference” without any definition or indication of what is meant by “jeopardy” or “adverse modification.” We have similar concerns with the proposed language regarding heat and public swimming areas.

We can envision numerous situations where some impact to fish passage, critical habitat, heat or public swimming areas is viewed by most people as insignificant but will be claimed by someone to be unreasonable interference. This lack of clarity will make the rule ripe for litigation and result in significant legal expenses for DEQ and the regulated community. Important environmental decisions would then be made by judges rather than by DEQ.

Additionally, the provision related to the bioaccumulative nature of pollutants doesn't belong on a list of situations that will, by definition, constitute unreasonable interference. We understand the concern with bioaccumulative pollutants but this is not the location in the rule to address them.

#### **060.02. Mixing Zones for Outstanding Resource Waters.**

We ask that the Attorney General's office review this deletion to see if it triggers the provisions of 39-3623, Idaho Code. That law requires that certain rules related to Outstanding Resource Waters be adopted by statutory enactment. While we don't anticipate that requiring statutory enactment of this proposed rule would be an insurmountable hurdle, it will be best if we know now that we face that situation.

#### **Multiple Discharge Points For a Single Activity**

DEQ asked for suggestions for language to deal with the issue of multiple discharges to a waterbody from a single activity. This is not uncommon in mining situations where the activity takes place over a large landscape. In many cases the distinct discharge points may be miles apart. It would be expensive, and perhaps impossible, for some mines to consolidate their discharges to a single point or to have the mixing zones associated with multiple discharges reduced in size merely because there are multiple discharge points. The goal of the mixing zone policy is to assure compliance with water quality standards at the mixing zone boundary. This goal can be met with separate mixing zones for multiple discharge points for a separate activity.

We suggest this be addressed by rewriting 60.01.e:

Multiple mixing zones may be established for a single activity with multiple points of discharge. When these individual mixing zones overlap or merge, their combined area and volume shall not exceed that which would be allowed if there was a single point of discharge. When these individual mixing zones do not overlap or merge they may be authorized as individual mixing zones.

While DEQ asked that are our specific comments focus on the provisions discussed at the initial negotiated rulemaking meeting, we think it important to notify DEQ of other issues we expect will require significant discussion at future meetings. These issues include determining what is “unreasonable” interference with beneficial uses, mixing zones on 303(d) streams, mixing zones for lakes and reservoirs, non-point discharges (particularly storm water) and bioaccumulative pollutants.

We ask that the June 12 meeting be structured to assure adequate time to discuss and negotiate how the rule will address these issues. The June 12 meeting may not allow sufficient time to resolve all of these issues. We request that DEQ schedule at least one additional meeting before finalizing its proposed rule. The failure to have an adequate discussion of these issues and simply relying on written comments to address them would seem to violate the intent of the legislature that rules like this be developed through a negotiated rulemaking process.

Thanks again for this opportunity to share our thoughts and concerns. We look forward to working with DEQ to develop a rule that will reduce ambiguity, better articulate mixing zone requirements and comply with other departmental policies in a way that does not increase the costs incurred by the regulated community.

Sincerely,



Jack Lyman  
Executive Vice President

cc: Jani Revier, Division of Financial Management  
Stephen Goodson, Governor's Office