



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
Northwest Region  
Snake River Basin Office  
10095 W. Emerald  
Boise, Idaho 83704

June 30, 2014

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

Re: Comments for the Preliminary Draft No. 2 Rule Language for the Mixing Zone Policy  
(Docket 58-0102-1401)

Dear Ms. Wilson:

The National Marine Fisheries Service (NMFS) has reviewed the language in the second draft of the preliminary rule discussed during the June 12<sup>th</sup> negotiated rulemaking meeting. NMFS remains concerned about how the rules will be implemented in the future, specifically in regards to potential impacts on species and their critical habitats listed under the Endangered Species Act (ESA). This concern is exacerbated where rule language can be broadly interpreted.

At the rulemaking meeting, the Idaho Department of Environmental Quality (IDEQ) requested comments be focused on parts of the rule that were discussed, including 060.01.d and 060.01.j. NMFS is offering comments on these sections, in addition to two other sections (i.e., 060.01.h and 060.01.i) that were discussed during the meeting. Our comments and recommendations are summarized in the following sections and are intended to seek or provide additional clarity for those provisions whose implementation could affect ESA-listed species or their critical habitats. NMFS is participating in good faith in the rulemaking process; however, our comments, or lack thereof, cannot imply a pre-decisional determination of the outcome of any future consultation undertaken for Environmental Protection Agency's approval of mixing rules adopted by Idaho.

Section 58.01.02.060.01.d. – Unreasonable Interference

Our understanding of this section of the rule language is to present examples of mixing zones that are considered to unreasonably interfere with the beneficial uses of the water body under review. These examples are not intended to be an exhaustive list of what could be considered

unreasonable interference; however, they represent the spectrum of mechanisms for effects that mixing zones might have on beneficial uses. Our comments are limited to those subsections applicable to aquatic life.

*Interference with fish passage, spawning, egg incubation, or rearing:* Use of the word “interference” to identify examples of what would be “unreasonable interference” is inadequate. Furthermore, the threshold of “interference” that IDEQ considers to be “unreasonable” is unclear. Complete blockage of fish passage clearly constitutes “unreasonable interference.” What is less clear is when interference to various life stages of fish crosses a line from being acceptable to “unreasonable.” For example, mixing zones causing a delay in adult fish passage such that pre-spawn mortality occurs would be considered “unreasonable interference”; however, identifying the delay threshold will be site-specific and cannot be readily and clearly stated in rule language. As such, it is necessary to include some language that allows flexibility for determining what could be considered unreasonable. To do this, NMFS recommends the following edits be made to the proposed rule language:

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:

- i. Blocking or otherwise obstructing passage for any life stage of fish.
- ii. Preventing or limiting successful spawning, egg incubation, or rearing.

*Jeopardy to ESA listed species or destruction or adverse modification to critical habitat:* NMFS commented on this subject in our letter dated May 14, 2014. NMFS recommends the deletion of subsection 060.01.d.ii. A new subpart addressing ESA-listed species and critical habitats should be added under 060.01 to specifically address considerations that must be taken into account whenever a new or existing mixing zone is proposed for authorization or reauthorization within anadromous fish habitat. NMFS suggests the following language:

060.01.XX. Mixing zones shall be designed to avoid or minimize adverse effects to species and critical habitat listed under the Endangered Species Act (ESA). At a minimum, mixing zones shall meet all provisions of Section 060.01 that are applicable to aquatic life impacts and:

i. be authorized only after it has been demonstrated that the effluent will be treated using the most effective methods that are technologically and economically feasible.

ii. not be located in manner that results in accumulation of effects from multiple mixing zones.

iii. not be located in known spawning areas.

iv. shall not contain concentrations of pollutants in any portion of the mixing zone, including the zone of initial dilution, that could cause direct mortality or contribute in a predictable or measurable fashion to indirect mortality such as increased predation for ESA-listed species.

*Bioaccumulative pollutants:* As drafted, the preliminary rule language does not provide any insight into a potential threshold for what is unreasonable interference. It is known that some contaminants have the potential to bioaccumulate and adversely affect ESA-listed species or their forage base. We believe site-specific evaluation, especially in anadromous fish habitat, is necessary to evaluate whether a discharge has the potential to cause, or is causing, unreasonable interference. As such, NMFS proposes the following language:

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. Physical, chemical, or biological monitoring shall be conducted to determine effects when bioaccumulation occurs.

*Acute toxicity outside the ZID:* As drafted, the preliminary rule language appears to allow for acutely toxic conditions (e.g., chemical concentrations that would result in adverse effects after a short-term exposure) within the ZID. NMFS believes acutely toxic conditions should not exist in any part of the mixing zone, including the ZID. We recommend the following language:

v. Lethality to passing organisms.

*Attraction to mixing zone:* Currently, the rule language does not address unreasonable interference associated with mixing zones that could create attractive conditions and lead to organisms being exposed to contaminants for a greater period of time or at a greater frequency than expected. NMFS recommends that IDEQ add the following language to examples of unreasonable interference:

060.01.d.iii. Attracting aquatic organisms.

#### Sections 58.01.02.060.01.h.and 060.01.i – Mixing Zone Restrictions

The language in these sections appear to imply that mixing zones using 25% of the critical stream volume or 25% of the width will be automatically granted. Although NMFS appreciates the addition of language indicating when smaller mixing zones may be authorized, as written the language appears to only limit mixing zones in those situations where smaller mixing zones are *needed* to not cause unreasonable interference. While we recognize there is language in the rule to ensure that mixing zones aren't larger than necessary, we are unclear how IDEQ will evaluate this standard in conjunction with the provisions at 060.01.h and 060.01.i. In order to recover ESA-listed species, it will be necessary to not only design programs that avoid or minimize adverse effects, but also to design programs that emphasize the conservation of ESA-listed species and their critical habitats. To accomplish this, IDEQ should include rule language emphasizing the need to rigorously evaluate mixing zone authorizations on a case-by-case basis and only authorize that amount of dilution that is truly necessary and still meets the objectives of

recovering Chinook salmon and steelhead populations in Idaho. In addition to adding language regarding site-specific analysis, NMFS recommends the IDEQ make the following changes to the rule language at 060.01.i.i.:

i. A smaller mixing zone is needed to avoid an unreasonable interference with, or danger to, existing beneficial uses as described in Subsection 060.01.d, or to meet the other requirements set forth in Section 060; or

Thank you for considering our comments and we look forward to participating in the July 10, 2014 negotiated rulemaking meeting.

Sincerely,



David Mabe  
Snake Basin Office Director

Bcc: File Copy, Read File, Johnna Sandow

Sandow:Mabe:ts:2014 Jun 30 IDEQ MZRd2

