



www.idahoconservation.org

Idaho Conservation League

PO Box 844, Boise, ID 83701
208.345.6933

July 24, 2014

Paula Wilson
DEQ State Office
Attorney General's Office
1410 N. Hilton
Boise, ID 83706

Submitted via email: paula.wilson@deq.idaho.gov

Re: Docket No. 58-0102-1401 - Preliminary Draft Negotiated Rule - Draft No. 4

Dear Ms. Wilson;

Since 1973, the Idaho Conservation League (ICL) has been Idaho's voice for clean water, clean air and wilderness—values that are the foundation for Idaho's extraordinary quality of life. The Idaho Conservation League works to protect these values through public education, outreach, advocacy and policy development. As Idaho's largest state-based conservation organization, we represent over 25,000 supporters, many of whom have a deep personal interest in protecting Idaho's water quality and fisheries.

Thank you for providing us an opportunity to review and comments on DEQ's proposed mixing zone language. It is our understanding that DEQ wishes to receive comments on all sections of draft #4. Our comments on these portions are attached.

We anticipate that we will have additional comments on these matters as amended in future drafts.

Please contact me if you have any questions at 208-345-6933 x 24 or jhayes@idahoconservation.org

Sincerely,

Justin Hayes
Program Director

General Comments

ICL does not support the use of mixing zones. We do not believe that it is appropriate to authorize the violation of water quality standards in portions of a water body. If a discharger wishes to discharge at levels that will violate current water quality standards, we believe that the discharger should seek a variance or a site-specific water quality standard. If the discharger is able to demonstrate that the receiving water and the designated uses can be protected by the application of a site-specific criteria less stringent than the regular water quality standard then they should proceed in this manner, rather than operate under a 'mixing zone' construct. If they are not able to successfully apply for and receive a variance or a site-specific criteria for the area in which they discharge, they should comply with existing water quality standards (WQS).

Additionally, we believe that it is never appropriate for the *acute* water quality standards to be violated within a waterbody. With regard to this draft rule language, we do not believe that the violation of acute WQS should be allowed in a zone of initial dilution.

Notwithstanding our objection to the use of mixing zones and zones of initial dilutions, we provide the following comments to DEQ's draft language.

Section 0.60.01.a

We support the provision that states that mixing zones shall not be authorized for a given pollutant when the receiving water does not meet water quality standards for that pollutant.

We do not object to the portion of this section's language that states that a mixing zone *may* be authorized for a given pollutant when the receiving water does not meet water quality standards for that pollutant if that discharge is consistent with a TMDL wasteload allocation. However, we oppose the notion that some other 'applicable plans or analyses' should be allowed to justify a mixing zone as a substitute for a TMDL wasteload allocation. TMDL WLAs go through a defined, rigorous development process that includes public comment and EPA approval. These 'other' plans and analyses do not necessarily receive the same scrutiny and effort and thus should not be held up as equal.

The above statements notwithstanding, we think that DEQ should seek to make its mixing zone policy implementation consistent with its antidegradation implementation. To this end, mixing zones should not be authorized for any pollutants when a receiving water is not in compliance for any pollutant; even if the pollutant in the discharge is different than the pollutant that is exceeding water quality criteria.

DEQ's antidegradation policy adheres to a 'waterbody by waterbody' approach. However, DEQ's mixing zone policy seeks to take advantage of a 'pollutant by

pollutant' approach. This inconsistency needs to be resolved to ensure constant water quality protection.

Section 0.60.01.b

We do not believe that it is ever appropriate for a portion of a waterbody to be allowed to exceed an acute water quality standard. We do not believe that zones of initial dilution should be authorized if the ZID will violate an acute water quality standard. Doing so would, by definition, cause 'unreasonable interference' with aquatic organisms.

Section 0.60.01.c

It is unclear to us how DEQ will judge whether or not a mixing zone is larger than 'necessary.' How does DEQ judge what is necessary? This is inherently arbitrary and subjective. DEQ must develop some metrics to gauge what is, and what is not necessary. We recommend that DEQ adopt a socio economic test similar to the test that DEQ utilizes in the antidegradation policy.

Section 0.60.01.d.iv

This section prohibits the authorization of a mixing zone that causes lethality to aquatic life passing through the mixing zone. This appears to conflict with prior sections which authorize ZIDs that violate the chronic WQS for a pollutant. We believe that the protections that this section is attempting to secure should negate the authorization of ZID that violates acute WQSs and as such, the prior section authoring ZIDs should be stricken.

Section 0.60.01.g

This section prohibits overlapping mixing zones for independent activities. We believe that this section should be strengthened by providing some minimum distance between two such mixing zones. This minimum distance between mixing zones will lessen the impact on aquatic life and will also ensure that the mixing zones do not inadvertently overlap as stream channel morphology, flow volume and stream temperature change.

Section 0.60.01.h

This section provides that mixing zones shall meet certain restrictions, then states that DEQ may authorize mixing zones that vary from these restrictions per 0.60.01.i. We do not believe that DEQ should be authorized to approve any mixing zones that vary from the restrictions in 0.60.01.h. There needs to be a clear understanding and certainty about the maximum size of a potential mixing zone. Ensuring a maximum limit on size will make DEQ's job more practical and consistent when DEQ is asked to judge what size mixing zone is 'necessary'. Further, it may prove very difficult for the NMFS and the FWS to undertake ESA consultation if there is no hard limit on mixing zone size.

Section 0.60.01.h.i.1

What is the definition of 'flowing water?'

What is the justification for allowing a mixing zone to extend to up to 25% of the width of the stream? Why not 10%?

Also, the width of a stream is often dependent on the amount of water in the stream at any particular time. Section 0.60.01.h.i.2 contains provisions that base certain aspects of mixing zones on various low flow conditions. (Although this language is not very clear and appears to reference a design condition of the discharge instead of a low flow stream condition). We believe that 0.60.01.h.i should similarly contain some means of determining which stream width DEQ is talking about – does DEQ mean the width of the stream at flood stage or at the critical volume per 210.03.b? In the name of consistency, it would seem reasonable to utilize the stream width that would be defined per 0.60.01.h.i.2.

0.60.01.h.i.2.

What is the justification for allowing a mixing zone to include to up to 25% of the “critical volume” of the stream flow? Why not 10%?

0.60.01.h.ii.

What is the definition of ‘nonflowing waters?’

We do not believe that mixing zones should be allowed in ‘nonflowing waters’ as this is likely to result in a relatively stationary zone in which the WQS is violated. Aquatic organisms may inadvertently spend too much time in this stationary mixing zone and be exposed to pollutants for periods of time that ultimately prove harmful to the organism. We would argue that a Mixing Zone does not belong in nonflowing water because species may occupy the mixing zone for sufficient time to cause mortality and/or result in a portion of the waterbody that causes unreasonable interference to organisms.

This section does not speak to whether or not a ZID would be allowed in a nonflowing water. We would argue that a ZID does not belong in nonflowing water because species may occupy a ZID for sufficient time to cause mortality and/or result in a portion of the waterbody that causes unreasonable interference to organisms.

0.60.01.h.ii.1

What is the justification for allowing a mixing zone to occupy 5% of the surface area of the waterbody? What is the justification of to allow the mixing zone to occupy an area up to 100 meters? Why not 1% and 10 meters?

0.60.01.h.ii.3

DEQ should state what the intent of using a diffuser is – this way DEQ can be sure that the diffuser is designed to achieve the desired affect.

0.60.01.h.iii

What is the justification for saying a reservoir with a mean detention time of 15 days or greater is considered ‘nonflowing water?’

Is a mean detention time of greater than 15 days the definition of nonflowing waters for lakes too?

What period of time is to be used to gauge mean detention time? Is this an annual average? Is it a rolling average? What if the detention time average 15 days during some months by not others?

0.60.01.i.i

Language in this section implies that DEQ needs to justify the authorization of a mixing zone that is smaller than the 25% width and volume criteria. These seems backwards to us. The mixing zone should be presumed to be “0” and any increase above this should need to be justified.

0.60.01.i.ii

It is unclear how DEQ will judge when a larger mixing zone, or any mixing zone, is ‘needed.’ DEQ needs to develop some metrics to differentiate between when a larger mixing zone is ‘needed’ vs merely desired. There is virtually no situation where the size of a mixing zone could not be decreased via the application of additional resources for treatment. How will DEQ determine when a discharger actually ‘needs’ as larger mixing zone vs the discharger has just decided that they do not want to spend the money that is required to clean up their effluent?

Additional Comments

It is not clear how Idaho’s antidegradation rules and this proposed mixing zone rule will work together. DEQ may want to consider adding a section that discusses the use of mixing zones in Tier 2 water.