



United States Department of the Interior U.S. Fish and Wildlife Service

Idaho Fish And Wildlife Office

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1410 North Hilton
Boise, Idaho 83706

Subject: Comments Regarding the Proposed Mixing Zone Rule (Docket 58-0102-1401)
In Reply Refer To: 01EIFW00- 2014-TA-0857

Dear Ms. Wilson:

The Idaho Fish and Wildlife Office of the U.S. Fish and Wildlife Service (Service) submits the following comments on the Idaho Department of Environmental Quality's (IDEQ) proposed mixing zone rule language that was published in the Idaho Administrative Bulletin, Volume 14-9 (September 3, 2014). Mixing zones in relation to water quality standards have been a challenging area of concern for the Service. We submit these comments to facilitate the following:

- Clarifying the IDEQ's roles and responsibilities associated with the Endangered Species Act (ESA);
- Sharing the Service's concerns with language contained in the proposed rule relative to ESA compliance;
- and, providing some recommendations that may increase conservation of species/critical habitats relative to the proposed rule.

Responsibilities Under the ESA

Regardless of Private, State¹, or Federal affiliation, section 9 of the ESA prohibits the unauthorized take of listed species; IDEQ has an ongoing responsibility to ensure any guidance/direction contained in proposed rules fully considers the needs of species and critical habitats protected under the ESA. EPA, as the lead Federal agency for the issuance of National Pollutant Discharge Elimination System (NPDES) permits, has an obligation to consult with the Service on actions it authorizes, funds, or carries out, as outlined in section 7 (Interagency

¹ In the absence of a Federal nexus (e.g., if Idaho is granted primacy for implementing the NPDES program), section 9 still applies, but opportunities exist through section 6 (Cooperation with the States) or section 10 (Exceptions) to be permitted for any incidental take that may occur while implementing an otherwise lawful activity. Such consultations also may result in the exemption of any take of listed species incidental to the implementation of an otherwise lawful activity.

Cooperation), to ensure its actions do not jeopardize listed species or result in the destruction or adverse modification of critical habitat. As the NPDES program often relies on rules carried forward by the IDEQ, it is imperative that proposed rules fully consider the ESA implications and appropriately set the stage to ensure ESA compliance through any subsequent section 7 consultation.

Concerns with Current Rule Language Relative to ESA Compliance

As currently written, the proposed rule does not provide adequate protections to ESA-listed species/critical habitat such that ESA compliance could be assured through subsequent S7 consultation with the EPA. According to the IDEQ², specific ESA language was removed because, "...protecting aquatic life beneficial uses inherently includes all aquatic organisms, including those listed as endangered or threatened." While we applaud IDEQ's desire to protect cold water aquatic life (CWAL) beneficial uses, the current proposed language falls short in fully meeting the intent of the ESA through enhanced conservation efforts for species at risk of extinction. The CWAL beneficial use places emphasis on ensuring water quality is appropriate for the protection and maintenance of a viable aquatic life *community* for cold water species; it is not necessarily designed to provide specific protections to individual organisms as required by the ESA. The intent of the ESA is to ensure populations do not go extinct and that protections are afforded to individual organisms via section 7 when an action may adversely affect its ability to feed, reproduce, or seek shelter. Thus, aquatic organisms in general may be adequately protected, but specific conservation measures aimed at protecting ESA-listed individuals are lacking.

It is our understanding that the IDEQ removed specific ESA language because the agency contends it does not have the authority nor the expertise to perform the type of effects analyses considered necessary to document ESA compliance. We believe a clear understanding of the value and importance of such analyses is necessary for all partners engaged in informing, implementing, and reviewing NPDES permits and the associated water quality criteria they are meant to address. We also believe it is important to address these issues as early in the process as possible. Thus, whether acting in concert with EPA or as an agency ultimately responsible for the NPDES program, IDEQ should clarify its role in ensuring ESA compliance through the drafting of proposed water quality rules. Draft rules authorizing specific mixing zone criteria must reflect a clear understanding of ESA obligations.

Additional clarification in the rule would prevent confusion regarding ESA requirements and would support details in a subsequent guidance document. Recognizing that sometimes regulatory language lacks specificity in deference to providing flexibility, the lack of clarity in the proposed mixing zone rule elevates the level of concern for our agency which is relying on rules such as this to provide protection to resources of mutual interest. The ambiguity in the following language does not provide a high level of confidence that effects to species listed under the ESA will be adequately addressed: 1) "exceeding" chronic and acute water quality criteria (by how much and under what circumstances?); 2) the size of mixing zones will be no larger "than necessary"; and 3) "unreasonable" interference with, or danger to, beneficial uses, (how will necessary and unreasonable be determined?). Another example of language that can

² IDEQ. 2014. Negotiated Rulemaking Summary Idaho Code §67-5220(3)(f). August 28. 8 pages.

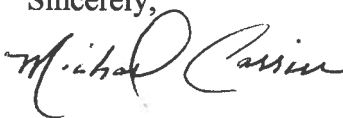
be (mis)interpreted addresses the potential automatic authorization for using 25% of the critical streamflow volume for dilution, although the IDEQ later indicates that it is not its intent to automatically authorize the use of 25% of the critical streamflow volume for dilution. Such ambiguity leads to a decreased ability to appropriately analyze potential effects of mixing zones on listed species/critical habitat.

Recommendations to Facilitate ESA Compliance

Where possible, it would be prudent for the rule to identify specific conservation language, measures, or strategies that would address the enhanced protections afforded listed species/critical habitat under the ESA. If specific conservation measures or areas of important resource overlap cannot be meaningfully identified at this time, a potential solution would be a binding strategy that identifies procedural steps involving the Service that would be undertaken prior to approval of a specific mixing zone request. Establishing a coordination process would maximize the potential to ensure all appropriate conservation measures have been adequately considered relative to ESA-listed species when reviewing mixing zone requests. And although a strategy/coordination process does not in and of itself enhance protections for listed species, such language included in the rule may provide sufficient confidence that the needs of individuals and habitat would have an opportunity to be appropriately addressed, and that any ensuing section 7 consultation on adopting the rule may proceed more expeditiously.

In the absence of clear ESA-related conservation measures or a meaningful ESA-related strategy in the rule, we recommend a provision be included that recognizes EPA's oversight of individual permits where ESA issues ("may affect" situations) are anticipated. EPA oversight in these situations ensures a separate section 7 consultation process will be initiated where specific conservation measures could be outlined. The Service is seeking certainty that ESA concerns will be appropriately addressed. Absent that certainty, subsequent consultations with EPA may be protracted and difficult.

We appreciate your consideration of these comments as you finalize and submit for approval to EPA the rule addressing mixing zones. It is our intent to work with you as a partner to ensure the rule adequately addresses ESA concerns, sets the stage for an expedited consultation process, and leads to enhanced conservation of ESA listed species/critical habitat. Please contact Russ Holder (208-378-5384) or Mark Robertson (208-378-5287) if you would like to discuss these comments further.

Sincerely,


Michael Carrier
State Supervisor

cc: NOAA, Boise (Mabe)
EPA, Seattle (Chung, Macchio, Palmer)
EPA, Boise (Grafe)