



IDAHO MINING ASSOCIATION

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October 2, 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.

IMA is concerned that there is no clear justification for the proposed rule. Based on our members' experience, the existing mixing zone rule was implemented by DEQ to ensure that beneficial uses in the receiving water were protected after mixing. We are unaware of any DEQ-authorized mixing zones which resulted in beneficial uses not being protected in the receiving waters. Absent a clear need for this proposed rule, we fail to see the need to clarify the existing rule.

In our initial comments on this rulemaking, we congratulated DEQ for its strong assurance that this rulemaking would not result in increased costs to the regulated community. 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

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commitment, repeated several times during each of the negotiated rulemaking meetings, to updating its mixing zone rule without imposing additional costs was especially appreciated.

As we have delved into this proposed rule in more detail we are now very concerned about the potential costs associated with it. New concepts are introduced into the proposed rule including a definition for bioaccumulative pollutants and conditions under which a mixing zone for bioaccumulative pollutants is prohibited. Many new undefined terms are used in the proposal including “thermal shock,” “susceptible to predation,” “disorientation” and “cold water refugia.”

We are concerned that the costs to permittees to fund the studies necessary to demonstrate compliance with the new concepts in the proposed rule will be significant. Although DEQ asserts in its notice that the proposed rule is simply a clarification of the existing rule, it is clear the proposed rule will make it more difficult to obtain a mixing zone in the future. This will impose significant treatment costs on permittees in order to achieve water quality criteria prior to discharge.

It appears that many of the new provisions in the proposed rule noted above exceed the requirements of the Clean Water Act and are, therefore, inconsistent with Idaho’s stringency provisions at Idaho Code Section 39-3601. We ask that DEQ’s Deputy Attorney General specifically review this issue to determine whether the proposed rule is, in fact, compliant with the statutory stringency provision.

Finally, it appears that many of the provisions in the proposed rule were designed to avoid jeopardy or destruction of critical habitat for aquatic species protected under the Endangered Species Act. Assuming the validity of such an approach under the ESA in this proposed rule, it is likely that only a small percentage of NPDES permits discharge to waters containing ESA protected species. The proposed rule, however, is broadly worded to prohibit impacts to all aquatic species. We are very concerned that the proposed rule’s focus is no longer based on protection of beneficial uses in the receiving water but rather on individual biota in the receiving water. Such an approach basically defeats the purpose of a mixing zone.

We have the following specific comments:

1. *Discharge to Impaired Waters.* We appreciate DEQ’s efforts in reworking this section to allow some flexibility for discharges to impaired waters when a TMDL or other facility-specific analysis occurs. In light of the way DEQ lists

all tributaries to impaired water in its 303d list, however, we believe this section could be further clarified. We request that this provision apply only when the receiving water “immediately downstream of the discharge” does not meet the criteria for the pollutant. DEQ should not prohibit mixing zones if a waterbody is impaired many miles upstream or downstream from a discharge.

Further, in the event a TMDL or other analysis authorizes a mixing zone, it is not clear from the proposed rule how the application of narrative criteria or compliance with chronic criteria at the edge of the mixing zone could further limit the ability to be granted a mixing zone.

2. *Bioaccumulative Pollutants.* We believe the provisions related to bioaccumulative pollutants are more stringent than the minimum requirements of the Clean Water Act and are, therefore, in violation of the stringency provisions of Idaho law. We are unfamiliar with the proposed definition of bioaccumulative pollutants or the basis for the selection of a bioaccumulation factor and bioconcentration factor.

DEQ is required to use “best available peer reviewed science and supporting studies” to support its rules [Idaho Code 39-107D(2)]. It is unclear from the record what the scientific basis is for DEQ’s definition or the proposed factors. In terms of the implementation of the proposed rule, DEQ proposes to ban mixing zones for discharges of bioaccumulative pollutants when “tissue levels in aquatic organisms are higher than applicable water quality criteria would predict.”

This provision is difficult to comprehend. Does the applicable water quality criteria predict a particular tissue level? Where in the waterbody would the tissue levels in aquatic life be measured? Whatever this provision means, it is possible that tissue levels in aquatic species could be higher than what the “criteria predicts” or, indeed, may be high enough to trigger a fish consumption warning throughout a water body due to a variety of causes such as air deposition or legacy conditions.

In such a situation it seems very burdensome to require a point source to meet very stringent criteria for the pollutant when the point source is not causing the higher tissue levels. Further, if a water body is really impaired for a bioaccumulative pollutant then the provisions for discharges to impaired water should address the situation. We are very concerned that DEQ is proposing a new aquatic species tissue standard in this proposed rule without any science to support it and contrary to various provisions of Idaho Code.

3. *Stormwater Discharges.* Many of our members currently discharge stormwater pursuant to EPA general permits. Mines are often located in remote areas covering large areas of land. Management of stormwater can often be a challenge and, depending on the severity of the weather, it is often necessary to discharge large volumes of storm water which come into contact with native mineralized materials.

Because of the intermittent nature of stormwater events, the EPA storm water permits do not require numeric water quality limits prior to discharge but rather require best management practices. Allowing a mixing zone for storm water discharges makes sense because of their intermittent nature and the fact that such discharges occurs during high flow conditions. We believe the proposed rule should make clear that mixing zones are authorized for stormwater discharges unless DEQ determines in its 401 certification that mixing zones are not authorized because of impacts to beneficial uses.

We are hopeful that DEQ will incorporate the changes we have suggested so the proposed rule does not increase costs to the regulated community and is consistent with the legislative intent expressed in the stringency provisions and “good science” requirements of Idaho law. If these changes are made, we would expect to fully support the proposed rule before the Board of Environmental Quality and before the legislative committees that will review it in January.

The mining industry takes its responsibilities to comply with state and federal water quality requirements and standards very seriously. Thanks again for this opportunity to share our thoughts and concerns.

Sincerely,



Jack Lyman
Executive Vice President