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Idaho Conservation League

PO Box 844, Boise, ID 83701
208.345.6933

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

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

Re: Idaho Conservation League Comments re Idaho Pollutant Discharge Elimination System Program: Docket No. 58-0125-1401 - Negotiated Rulemaking. Public Comment period #2

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, fisheries and the health of Idaho residents. The issuance of NPDES permits is critical to protecting and restoring water quality in Idaho. Idaho's effort to obtain primacy over discharge permits issued within its borders has the potential to significantly affect water quality in Idaho.

DEQ has asked for public comment on two documents: 1) version 1.1 of proposed language regarding confidentiality and the incorporate of pertinent NPDES rules, and 2) DEQ's draft 2.0 of Permit Process, Application, and Public Participation.

Our comments are attached.

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

Sincerely,

Justin Hayes
Program Director

ICL Comments Re: Idaho Pollutant Discharge Elimination System Program: Docket No. 58-0125-1401 - Negotiated Rulemaking. Public Comment Period #2

Proposed language regarding confidentiality

We continue to believe that additional language needs to be added which clarifies that all documents, plans, schedules, monitoring data, reports etc. that are submitted to the agency pursuant to a requirement included in an IPDES permit will be made available to the public and any claim of confidentiality for such materials shall be denied.

This language is required because the currently proposed language fails to provide that materials submitted to the department, as a term of compliance with a discharge permit, are publicly available documents.

Incorporate Pertinent NPDES Rules and Requirements

We continue to believe that if Idaho successfully obtains primacy over CWA discharge permit issuance in Idaho, it will be very important that DEQ take all of the steps that will be necessary for Idahoans to fully understand the intricacy and complexities of the new IPDES program. Failure for the regulated community, agencies, citizens and other interested parties to understand the IPDES program will greatly reduce its effectiveness and hamper transitioning to state control.

A key aspect of understanding the program will be providing a single set of rules for people to consult. To this end, we believe that reprinting *all* of the necessary NPDES rules into the Idaho rules is the best way to proceed.

Merely incorporating the necessary federal rules by reference, while sufficient from a legal perspective, is not sufficient from the perspective of ensuring that Idahoans are provided with the needed materials, in an accessible format, to allow them to understand and comply with the rules for this new program. Trying to switch back and forth between IDAPA and the CFR will be confusing. Idaho is best served by having a single set of rules to reference.

We all expect that Idaho will adopt or copy verbatim only certain aspects of the existing federal rules. And, concurrent to this, Idaho will draft unique Idaho language to replicate the intent and requirements of some portions of the federal rules. This unique Idaho language (if approved by the EPA) will ‘replace’ existing federal language that is currently in the CFR. It will be very confusing if an Idaho reader had to go find the germane CFR, read a line or two, get the IDAPA Rules, read a line or two, then go back to the CFR read a paragraph – go back to the IDAPA, insert single IDAPA sentence into the CFR paragraph *while mentally deleting the existing federal sentence with the unique Idaho sentence* – and then complete the CFR paragraph. This will be very, very confusing.

We believe that the best possible path forward if for Idaho to adopt whatever federal language it needs to and to craft whatever unique Idaho language it needs to and then to print the entire text of this State and Federal amalgam into Idaho’s IDAPA Rules so that it can be read as a single document.

Negotiated Rule language draft 2.0

Below are our comments on the language presented in ‘Negotiated Rule Draft No. 2.0.’ Some of our comments are raised in the hopes that the DEQ will alter the text of the draft rule. Other comments are raised not to necessarily alter the text, but rather to ask DEQ to explain what it is that the draft rule language means to DEQ. It is our hope that DEQ will use the ‘response to comments’ document to provide context to certain issues and further explain the intent or meaning of certain aspects of the draft rule.

Our comments are presented in the order of the draft rule and do not signify a ‘ranking’ of importance.

101.02 Continuation of Expiring Permits

It is unclear what the duration of an administratively extended permit is. We recommend that permit extensions last for one year, and that multiple extensions can be granted — but under no circumstances can a permit be extended for more than a total of 5 years.

101.02.a

It is unclear if the application needs to be determined to be complete prior to 180 days before expiration in order to be eligible for an extension.

102.01.b.i

Please elaborate on what factors the Director will take into consideration when determining if a permit application can be submitted, and an extension granted, within less than 180 days of the expiration of the current permit.

102.02.a.ii

It is unclear if this exclusion would exempt sewage discharge from a tour boat operator from regulation.

102.02.e

It is unclear how non-point agricultural discharges relate to the point sources excluded from IPDES permit requirements. Can you please explain what this subsection means?

Also, could you please provide some definition or context for the term ‘silvicultural point sources’?”

102.02.h

Could you please provide some definition or context for the term ‘water transfer’?”

103.04

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The term “Secretary of the United States Army Corps of Engineers” is used. Searching the internet for this leads me to conclude that this is no longer a recognized position at the Corps of Engineers.

103.07.a.ii

As discussed at the last rule making meeting, the Friends of Pinto Creek decision makes it clear that new discharges are not allowed into 303d waters unless the agency has subjected existing discharges to compliance schedules to bring the waterbody into compliance with WQS. If compliance schedules with point sources are not sufficient to ensure the attainment of WQS within a waterbody, then the agency must develop compliance schedules for non-point sources.

Please provide some guidance as to how the DEQ believes that the State will be bound by the Pinto Creek decision and how the DEQ will implement this provision. Further, does DEQ interpret TMDL implementation plans and WA’s as compliance schedules pursuant to this subsection?

103.07.b

This provision provides that the Director may waive the need for an applicant to submit certain information if the Director believes that the Department already has sufficient information to evaluate the applicant’s request.

We believe that public needs to be able to review the information used by the Director to evaluate an applicant’s request and that the applicant should be obligated to submit this information to the Department so that the application record contains all of the information necessary to review the application and the Department’s decision.

105.03

This subsection notes that when seeking coverage under an IPDES General Permit, the applicant needs to submit an NOI rather than an application. Section 130 is referenced with regard to the submittal of the NOI. We note that Section 130 is not yet available for review. We ask that as DEQ drafts Section 130, DEQ ensures that the NOI’s for General Permits contain sufficient detail that the public is able to evaluate the implication of such a discharge on the receiving water.

105.05 regarding application forms

Would DEQ consider developing new application forms? Some of the ‘current’ versions of the EPA applications referenced in the draft rule were developed many years ago and upon review seem outdated.

Also, as raised in the last rulemaking meeting, it appears that this section may not include the necessary provisions for Phase 1 and 2 MS4, CGP, MSGP and pre-treatment applications.

105.07.a.vi.(1)

This subsection provides that the Department can waive the requirement that an applicant list all of the toxic pollutants in a discharge if compiling such a list is “unduly burdensome.” Can you elaborate how DEQ would interpret “unduly burdensome.”

105.07.n

In the last rulemaking meeting, the DEQ stated that in instances where applicants cited the ‘small business exemption’ regarding the collection and submittal of certain data, the DEQ would be obligated to collect this data at Department expense since this data would still be required to review a permit application and develop an IPDES permit. Can DEQ please confirm this position?

105.07.n.ii

In the last rulemaking meeting, the DEQ stated that it had decided to alter the original CWA language to reflect the annual sales amount in 2014 dollars. Could DEQ please provide the justification for this deviation from EPA’s original text?

We believe that the DEQ would be better served by leaving the dollar amount in the original amount. Inflating the amount to 2014 dollars will likely mean that a greater number of applicants will seek to qualify for the exemption. And, as a result, the DEQ will encounter a greater number of instances where it will be forced to spend its resources collecting needed data.

105.08.d

This subsection provides that the Department may waive certain requirements related to testing and reporting. Could DEQ please discuss what sort of information DEQ would require when deciding to waive these requirements?

105.10 regarding CAAP facilities

As was discussed at the last rulemaking session, the list of information required in the CAAP application for a discharge permit is clearly insufficient to develop an IPDES permit. DEQ stated that it believe that it would have the authority to require additional information be included in the application. Could the DEQ please cite the section of this draft rule that provides the Department this authority?

105.11

It appears that the DEQ has added text to include “other dischargers designated by the Department’ to this subsection heading. Is it DEQ’s intent that these other ‘designated’ discharges will be codified in a developed list or is this section meant to serve as a catchall and the Department will, in the future, as needed, determine on the fly that an discharger falls under this subsection?

105.16

This section is limited to “new manufacturing, commercial, mining or silviculture” discharges. We suggest that DEQ add the term “and other” to this list. As was discussed during the last rulemaking session, it is possible that a discharger might immerge that does not fall neatly into the one of the listed categories (new manufacturing, commercial, mining or silviculture). We raised the issue of whether the Dixie Project – which is a pollution cleanup facility – would fall into any of these listed categories. It would be good to have a catchall to ensure that the Department was able to regulate other sorts of discharges.

108 regarding draft permits

As was discussed at the last rulemaking session, it would be helpful if the DEQ would discuss when or how the Department would go about issuing a supplemental draft permit in the event that such a supplemental document was necessary.

108.02

At the last rulemaking session, the DEQ stated that all draft IPDES permits would be issued with supporting documentation. Could the DEQ please confirm this statement?

108.02.iii

Would a permit that seeks to incorporate a mixing zone be captured under this subsection?

109 regarding public notice and comment

As was discussed at the last rulemaking session, the DEQ needs to ensure that the Department is calculating the length of comment and appeal periods in a manner that is consistent with the CWA. Does a public comment period start on the day it is announced or the following full day? Are comments do a midnight? Since Idaho encompasses two time zones, which time zone is used to compute timeliness?

Regarding public meetings, at the last rulemaking, it was discussed that the EPA has handled public meetings differently than the DEQ. For CWA purposes, public comments made at public meetings need to be captured and placed in the record as “public comments” on the permit.

Also, the Department should provide text in the rule that provides how the public can request (and receive) additional public meetings and how the public can request (and receive) an extension on a public comment period.

Further, it is important the Department note that since the public can deliver 'comments' at a public meeting which might occur after the stated close of the public comment period, the Department will need to ensure that the public comment period is automatically extended to encompass the public hearing.