Idaho Water Users Association, Inc.

1010 W. Jefferson St., Suite 101 • BOISE, IDAHO 83702
OFFICE - 208-344-6690 • FAX - 208-344-2744
E-MAIL - iwua@iwua.org
WEBSITE - www.iwua.org

February 17, 2015

VIA EMAIL: paula.wilson@deq.idaho.gov
Paula Wilson, Administrative Rules Coordinator
Idaho Department of Environmental Quality
1410 North Hilton
Boise, ID 83706

Re: Docket No. 58-0125-1401: Rules Regulating the Idaho Pollutant Discharge Elimination System Program (IPDES) - Negotiated Rule Draft No 2.0: Permit Process, Application, and Public Participation (February 13, 2015)

Dear Ms. Wilson:

These comments are submitted on behalf of the Idaho Water Users Association (IWUA), regarding the above-referenced Negotiated Rule Draft No. 2.0, posted on the Idaho Department of Environmental Quality (Department) website on February 13, 2015. Reference is made below to the specific provisions of Draft No. 2.0.

Rule 100. Effect of Permit - Purpose. IWUA supports the language contained in proposed Rule 100.01. In particular, it is important to recognize that irrigation and drainage entities have authority to approve or deny encroachments in or on their facilities, easements or rights-of-way, pursuant to the provisions of Chapters 11 and 12, Title 42, Idaho Code. In addition, no provision of Title 39, including Chapter 1, Title 39, Idaho Code shall be interpreted as to supersede, abrogate, injure or create rights to divert or store water and apply water to beneficial uses established under section 3, article XV, of the constitution of the state of Idaho, and title 42, Idaho Code. Idaho Code Sections 39-104(4) and 39-175C(6). IWUA appreciates the Department's recognition of these authorities and protections in the proposed rule.

Rule 101. Duration. Proposed Rule 101.01.a. provides that a permit may be issued for a period of less than 5 years. The rationale for this provision is set forth in IPDES Discussion Paper #2: IPDES Permitting Process (February 2015), including the ability to synchronize permitting schedules for those facilities that have both reuse and IPDES permits. It does not appear that this rational applies to the Pesticide General Permit (PGP). As a result, it is unclear why the Department would ever issue a PGP for less than 5 years. Given the regulatory burden involved with a shorter duration permit, IWUA suggests that the PGP be issued for a period of 5 years and that this be clearly expressed in the proposed rule.

With regard to the continuation of expiring permits in proposed Rule 101.02., these provisions only apply in the event that a permittee has submitted a timely and complete application for a new permit, and the Department does not issue a new permit before the expiration date. This rule fails to account for general permits, which we understand do not involve an application from the permittee. The proposed rule should be revised to provide that if a new general permit is not issued by the Department before the expiration date of the existing general permit, the existing general permit should be continued until such time that the Department issues the new general permit.

Rule 102. Obligation to Obtain an IPDES Permit. Proposed Rule 102.02. provides for exclusions from the IPDES permit requirement. In addition to the exclusions currently listed in the proposed rule, the rule should be revised to include an exclusion for "activities and sources not required to have permits by the United States environmental protection agency", as required by Idaho Code Section 39-175B. IWUA suggests that this statutory exclusion be added as a new subsection at the end of proposed Rule 102.02.

Rule 109. Public Notification and Comment. In addition to public comment, proposed Rule 109.02. provides for a consultation process with federal agencies, including the federal fisheries agencies that are responsible for administration and enforcement of the Endangered Species Act (ESA). In particular, proposed Rule 109.02.d. provides for recommended conditions from the federal fisheries agencies "necessary to avoid substantial impairment of fish, shellfish, or wildlife resources", which the Department may include in the permit if "necessary to comply with the provisions of applicable federal laws." In addition, proposed Rule 109.02.e. provides that "the Department may consult with one or more of the agencies", including the federal fisheries agencies referred to in proposed Rule 109.02.d.

These ESA consultation provisions run counter to state law which provides that: "all state permitting actions under the approved state program are to be state actions and are not subject to consultation under the endangered species act. . .There should be no conditions of approval of the state program that have the effect of undermining or circumventing these principles." Idaho Code Section 39-175A(1)(f). Consultation conditions proposed by federal fisheries agencies and adopted by the Department to comply with federal law undermine and circumvent the Legislature's express direction regarding delegation of the National Pollutant Discharge Elimination System (NPDES) program.

ESA consultation and federal-conditioning of NPDES permits by the federal fisheries agencies were major issues considered by the Idaho State Legislature during its approval of both the 2005 and 2014 NPDES delegation legislation. In 2007, the U.S. Supreme Court held that ESA consultation does not apply to Environmental Protection Agency (EPA) transfer of NPDES permitting authority to states. *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 127 S.Ct. 2518 (2007). The Supreme Court specifically found that nothing in the text of the Clean Water Act delegation provisions (Section 402(b)) authorizes EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.

Section 402(b) of the Clean Water Act requires that the State of Idaho have authority under nine criteria to be evaluated by EPA, in order for delegation of the NPDES program to be approved. None of these conditions require the consultation and federal fisheries agency conditioning authority proposed by the Department in Rule 109.d. and e. In particular, Section 402(b)(3) of the Clean Water Act requires that

the State have authority to "insure that the public. . .receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application". The Department proposes to go far beyond this authority in its public notification and comment rule.

The fact that EPA is not required to consult with the federal fisheries agencies under the ESA, and that state agencies are not required to consult under the ESA when making permitting decisions, were major factors in the Legislature's decision to direct the Department to prepare an application seeking primacy from EPA. As a result, it is crucial that this component of the proposed rule is consistent with the State Legislature's direction.

Rule 130. Administration of General Permits. While this proposed Rule is not included in Negotiated Rule Draft No. 2.0 and is scheduled for April 17, IWUA's review of Draft No. 2.0 raises some questions about general permits.

Will the processes for review, public notice, comment, decision-making etc. be the same as or different from those set forth in proposed Rules 106 through 109? Many of those provisions refer to applications, which of course are not involved in the general permit process. Draft No. 2.0 is not clear on this point. IWUA looks forward to learning more about the Department's proposed process for general permits, including the PGP.

IWUA appreciates the opportunity to submit these comments and looks forward to the discussions at the upcoming negotiated rulemaking meetings, including the one scheduled for February 20.

Sincerely,

Norman M. Semanko
Executive Director & General Counsel

NMS:kje