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## Idaho Conservation League

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Submitted via email: [paula.wilson@deq.idaho.gov](mailto:paula.wilson@deq.idaho.gov)

**Re: Docket No. 58-0102-1201- Fish Consumption Rate and Human Health Water Quality Criteria – Discussion #8: Human Health Criteria Implementation Tools**

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.

Our attached comments are presented in the order in which these topics are covered in DEQ's discussion paper.

Please contact me if you have any questions at 208-345-6933 x 24 or [jhayes@idahoconservation.org](mailto:jhayes@idahoconservation.org)

Sincerely,

Justin Hayes  
Program Director

### Nomenclature

DEQ has asked for comments “implementation tools” – specifically compliance schedules, intake credits, variances, and, to a lesser degree, several other schemes outlined in Discussion Paper #8. We take exception to the characterization of these schemes as “implementation tools.” These schemes are being proposed as a means of deferring or delaying compliance with new, more stringent water quality criteria. DEQ should refer to these schemes as “tools for delaying compliance” or “tools for delaying implementation” instead of “implementation tools.”

### Background Pollutants

It is the case that some naturally occurring components can be harmful to water quality. In some instances, these pollutants may ‘naturally’ be present in a waterbody at levels that exceed water quality standards. In instances where this occurs, it may be proper for DEQ (and/or EPA) to implement some mechanism which mediates a discharger’s obligation to clean up pollutants already present in their intake water. However, as the DEQ considers what to do about pollutants that are ‘naturally’ occurring, the DEQ needs to be very careful about how it determines what it means to say that a pollutant is naturally occurring.

In Discussion Paper #8, the DEQ makes reference to toxic metals in North and Southeast Idaho. In the North Idaho example, DEQ seems to be saying that toxic metals that find their way via interception and infiltration (I/I) into municipal wastewater treatment plants (WWTP) are naturally occurring; insinuating that WWTPs that discharge these metals may be excused from removing these pollutants from their wastewater.

We disagree with this line of reasoning. Setting aside that in this instance past mining practices resulted in waste materials being more prone to leach toxic metals into the groundwater, the WWTP’s failure to remedy its I/I problems has created a situation where contaminated groundwater is being unintentionally captured and then discharged. Had the WWTP properly installed and maintained its wastewater collection infrastructure, this pollutant would not be in the WWTP’s discharge at these levels. Entraining contaminated groundwater and discharging it to a surface receiving water is very different than utilizing contaminated intake water and discharging it back to the waterbody from which it originally came. It is not proper to provide any ‘natural background’ or ‘intake credit’ flexibility to WWTPs in such instances.

In the Southeast Idaho instance cited by DEQ, the agency seems to be saying that selenium contamination caused by poor mining practices should be considered as ‘background pollutants.’ Again, we disagree. Selenium concentrations observed in undisturbed areas may be considered as “background pollution.” However, in watersheds where human actions have caused selenium to be released at elevated levels, the resulting levels of selenium are not naturally occurring background levels.

### Utilization of These “Implementation Tools”

If a discharger wishes to utilize one of the schemes that DEQ is seeking to develop to

delay compliance with water quality standards, doing so would only be appropriate if the scheme was integrated into the discharger's NPDES (or IPDES) permit. Integrating the scheme into the discharge permit ensures that the public will be able to review the proposal and provide public comment, see the implementation of the scheme within the context of the discharge and receiving water, and have access to due process.

### Compliance Schedules

Compliance schedules have been utilized to provide dischargers with the time necessary to upgrade treatment systems to meet new water quality standards. And while the length of a compliance schedule can vary, and needs to be determined on a case by case basis, the overall intent needs to remain true to the notion that the compliance schedule is there to transition the discharger into upgrades to meet the standards. In instances where the compliance schedule stretches on for many, many years – DEQ cites that it has issued 20-year compliance schedules – the “compliance” aspect of the schedule is lost and the discharger is granted what is essentially authorization maintain the status quo indefinitely.

For compliance schedules to succeed in the dual goals of 1) providing dischargers time to upgrade, and, 2) get the facility to comply with the standards, the DEQ needs to develop rules that limit the duration of compliance schedules. To this end, we believe that the DEQ should not allow compliance schedules to extend beyond five years -- the life of a single NPDES (or IPDES) permit.

DEQ has developed language related to variances that might be a useful starting point in developing time limits for compliance schedules. IDAPA 58.01.02.260.1.d, noted below, creates a 5-year time limit, with the option to reapply.

- d. Any variance granted by the Department will remain in effect for a period of five (5) years or the life of the permit.
- i. Upon expiration of the five (5) year time period or permit, the discharger must either meet the standard or must re-apply for the variance in accordance with these rules.
- ii. In considering a re-application for a variance, the Department will require the discharger to demonstrate reasonable progress towards meeting the standard.

Failure to limit the duration of a compliance schedule to a single permit cycle causes the public to be exposed to harmful levels of pollutants for unacceptably long periods of time.

### Intake Credits

As noted previously, the development of any mechanism which allows that a discharger is not responsible for pollutants already present in the water that they use must be very cautious and conservative in determining how these pollutants got into to their process water and whether the pollutants in their water were actually going to find their way into the receiving water absent the discharger's use and discharge of the water. Further, it would be very important to ensure that the discharger's use of the water did not result in

altering the form or toxicity of the pollutant or its concentration in the discharger's waste stream.<sup>1</sup>

Further, it would be inappropriate to discharge groundwater-based intake water into surface water if the groundwater was more contaminated than the surface receiving water. Likewise it would be inappropriate to alter the volume, timing and location of groundwater entering surface water vis-a-vis that which would occur naturally.

DEQ notes that the opportunity exists in Idaho to use an "intake credits" scheme because Idaho "does have some toxins that naturally occur (arsenic) as well as pollution (mercury) from historic activities, especially mining."<sup>2</sup> As we have stated before, we think that it is wrong to allow a discharger to utilize an intake credit scheme when the pollutant being discussed is one that was put in the water via a human act. Past mining pollution is *not* natural background contamination. Similarly, elevated levels of a pollutant what are the result of an active (i.e. not historic) upstream activity or discharge are not part of a natural background load.

In watersheds with elevated levels of human caused/mobilized contamination, we believe that the discharger should engage in some form of pollutant trading or offsetting that would result in a net improvement of what quality even after the addition of the discharger's load.

#### Variations

It is not clear to us why DEQ would seek to develop a variance rather than simply develop a compliance schedule for the discharger.

DEQ notes that the EPA is expected to release new revisions of their variance regulations in 2015. Perhaps DEQ should wait until EPA releases their language before DEQ proceeds with this inquiry.

#### Restoration Water Quality Standards

We do not understand what is being proposed here.

Perhaps a better approach would be the discharger to engage in some form of pollutant trading or offsetting that would result in a net improvement of what quality even after the addition of the discharger's load.

#### Multiple Discharger Variance

Again, it is not clear to us why DEQ would pursue a variance over compliance schedules.

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<sup>1</sup> Increasing the concentration of a pollutant in a waste stream by consuming water (perhaps via evaporation) would result in an increase in the concentration of the pollutant in the receiving water relative to the point of diversion.

<sup>2</sup> Discussion paper #8, page 5

In an instance where there were multiple dischargers, we believe that compliance schedules with individual dischargers creates a greater level of accountability for the actions (and required upgrades) of each individual discharger.

#### Delayed Implementation of Rulemaking Components

We do not support this suggestion. It is not clear to us why DEQ would pursue delaying the implementation of a rulemaking component over the issuance of a compliance schedule.

A compliance schedule can be targeted to the needs, resources and timing of a specific discharger and be informed by the water quality and uses of a specific receiving water. This can be a very surgical approach. Delaying implementing a rule is at the opposite end of the spectrum and would result in a delay in improving water quality and reducing discharges across the entire state, whether it was necessary or not.

#### Site-Specific Background Pollutant Criterion Provision

See discussion above regarding Background Pollutants and Intake Credits.

#### Pollution Credit Trading

ICL remains open to supporting pollution credit trading. However, DEQ's current trading guidance provides insufficient guidance to determine if this course would be appropriate for use with Human Health Criterion.

In various sections above we have pointed to pollutant trading and offsetting as a possible means of addressing some of the issues raised by DEQ. As such, we would like to see DEQ develop further guidance on this issue.

#### Measures of Progress

We support the notion that DEQ should develop some consistent and robust means of measuring the progress made to reduce toxic discharges and to improve water quality. We hope that DEQ develops "measures" that measure improved water quality – not simply measure the number of actions undertaken. The number of actions taken to improve water quality is not meaningful without measurable improvements in water quality.

We advocate that the DEQ develop a fully funded program to sample water quality with sufficient frequency, and over sufficiently long periods of time, to develop meaningful datasets tracking water quality. Facilities seeking to delay their compliance with new water quality criteria via access to these "implementation tools" should be charged fees sufficient to underwrite the costs of such a monitoring program.