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Tuesday, April 21, 2015

Via Email to Paula.wilson@deq.idaho.gov

Paula Wilson
Idaho Department of Environmental Quality
1410 N. Hilton
Boise, Idaho 83706

RE: Water Quality: Docket No. 58-0102-1501 – Negotiated Rulemaking

Dear Ms. Wilson:

I write you regarding the above-referenced docket number, specifically regarding the Preliminary Draft (Draft No. 1) Negotiated Rule ("Draft Rule") concerning Use Attainability Analysis ("UAA"), which also includes proposed revision to Section 101.02 (Man-Made Waterways), and the three Discussion Papers (Paper Nos. 1, 2, and 3) posted in conjunction with the Draft Rule. I write you on behalf of the several irrigation delivery and drainage entities represented by this office, including Nampa & Meridian Irrigation District, Pioneer Irrigation District, and Settlers Irrigation District who, between them, provide irrigation water delivery and drainage services to well over 100,000 acres in the Boise River Valley.

The Draft Rule was posted on February 27, 2015, and the three Discussion Papers were posted on April 3, 2015. The Idaho Department of Environmental Quality ("DEQ") seeks comment on the Draft Rule and the Discussion Papers from interested negotiated rulemaking participants no later than today, April 21, 2015. While I was unable to attend the April 7, 2015 negotiated rulemaking meeting, Dan Steenson of this office was present for at least a portion of the same.

I. NEGOTIATED RULEMAKING PROCESS STATUS

It is our understanding that the negotiated rulemaking process is ongoing. For example, while a meeting was held on April 7, 2015, DEQ's website suggests that future meetings will likely be scheduled. Though the Draft Rule was posted in late February, the April 7 meeting discussion raised a number of issues that have yet to be fully vetted amongst the meeting participants. These issues should continue to be discussed at least amongst the interested parties prior to the Draft Rule being released for formal public comment. Moreover, the corresponding Discussion Papers were not posted until April 3, and it is likely premature to seek (or expect to receive) in-depth, formal comment regarding the same at this comparatively early date.

Regardless, DEQ's current April 21, 2015 initial comment deadline remains. Therefore, we submit the following preliminary comments, while reserving the right to comment further as this negotiated rulemaking process evolves.

II. APPROPRIATE SCOPE OF THE NEGOTIATED RULEMAKING

The Draft Rule and the related Discussion Papers are an outgrowth of a March 8, 2013 study request from Representatives Raybould and Denney (Chairmen of the germane House environment and resources committees) and Senator Pearce (Chairman of the Senate Resources and Environment Committee) that the Joint Legislative Oversight Committee ("JLOC") commission the evaluation of impediments to: (a) the preparation and use of UAAs to revise Idaho Water Quality Standards where/when appropriate; and (b) the implementation of water quality trading to facilitate and meet state and federal water quality standards and goals. The JLOC request resulted in a July 2014 report (Report No. 14-03) issued by the legislative Office of Performance Evaluations ("OPE") titled: *Challenges and Approaches to Meeting Water Quality Standards* ("OPE Report"). The initiating March 8, 2013 request letter is found at Appendix A of the OPE Report.

We are concerned that the Draft Rule exceeds the narrow scope of the March 8, 2013 legislative request and the subsequent OPE Report recommendations via the Draft Rule's proposed amendment of Section 101.02 (Man-Made Waterways), as further discussed in Discussion Paper No.2 (*Designation and Attainability of Beneficial Uses: Man-Made Waters*). The March 2013 request sought analysis of the use (or lack of use) of the UAA process to avoid the inappropriate designation of beneficial uses for waterbodies where designated uses (presumed or otherwise) prove unattainable. Thus, the request sought analysis directing better guidance and use of the UAA process to avoid inappropriate, unnecessary, and costly regulation of waterbody uses where such regulation was not warranted.

In response to the request, the OPE Report noted that clear state guidance on the development and use of UAAs was lacking and that the lack of guidance inhibited stakeholder: (a) determination of when UAAs should be used; and (b) preparation of UAAs meeting EPA's rigorous standards. OPE Report, p. 4. Consequently, OPE recommended that DEQ complete the UAA guidance document the agency commenced in FY2007, but had yet to complete. OPE Report, p. 34; *see also, id.*, Appendix B. Neither the March 2013 legislative request, nor the July 2014 OPE Report sought or recommended amendment of Section 101.02, or implicated the review or implementation of Section 010.58 (the definition of man-made waterways).

We are concerned that the Draft Rule's proposed amendment of Section 101.02 and Discussion Paper No. 2's review of Section 010.58 strays from the narrower scope of the legislative request and the subsequent OPE recommendation, and unwittingly (and needlessly) embroils stakeholders, DEQ, and EPA in arguments and presumptions of Clean Water Act ("CWA") jurisdiction. The nature and scope of CWA jurisdiction is a legal mine field that need not be a part of the Draft Rule either expressly or implicitly. While some "Man-Made Waterways" may ultimately prove jurisdictional upon further analysis, not all such waterways will. And, the jurisdictional determination must be made on a case-by-case basis. DEQ must be careful to not suggest otherwise in the Draft Rule or its supporting documents. Discussions during the April 7, 2015 meeting demonstrated that confusion over CWA jurisdictional presumptions exist, and the issue should be adequately addressed before the Draft Rule is disseminated for broader public review and comment.

III. NO JURISDICTIONAL PRESUMPTION SHOULD ATTACH

To the extent that DEQ is committed to revising Section 101.02, which could also implicate the application of Section 010.58, our clients want to make clear that any amendment must be made in a manner that avoids a CWA jurisdictional presumption attaching to man-made waterways. Idaho's Water Quality Standards only apply to jurisdictional waters, and not all "Man-Made Waterways" in Idaho (as that term is defined by Section 010.58) are jurisdictional. CWA jurisdictional determinations must be made on a case-by-case basis and those determinations are, in our view, a different topic for a different forum beyond the scope and purpose of the Draft Rule.

In sum, we agree with DEQ that the presumed use protections of Section 101.01 should not (and do not) attach to man-made waterways. But, that does not mean that all man-made waterways as defined in Section 010.58 are automatically jurisdictional either.

We thank DEQ for the opportunity to provide these preliminary comments. And, we are committed continuing participation in this negotiated rulemaking process. The Draft Rule is an important one, but with a narrow focus: to provide UAA guidance so that inappropriate beneficial use designations can be avoided and revised when necessary, nothing more.

Very truly yours,



Andrew J. Waldera

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