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April 21, 2015

Paula Wilson
DEQ State Office
Attorney General's Office
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Boise, ID 83706

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

Re: Docket No. 58-0102-1501- Negotiated Rulemaking re WQS Revisions and Attainability of Beneficial Uses

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 and fisheries.

Our attached comments are presented in the order in which these topics are covered in DEQ's discussion papers and draft #1 language,

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: Docket No. 58-0102-1501- Negotiated Rulemaking re WQS Revisions and Attainability of Beneficial Uses

Existing Uses – Discussion Paper #1

Idaho's current practice of identifying existing and beneficial uses within the framework of Idaho's designated use categories seems like the best approach going forward.

Utilizing this method is the most efficient from an agency resource perspective and allows the agency to utilize existing water quality criteria.

Efforts to develop unique designated/existing uses on a waterbody by waterbody approach strike us as inefficient from a resource allocation perspective and are likely to take many years to usher through the processes.

Man-made Waters – Discussion Paper #2

We do not agree with, or support, DEQ's current interpretation of Idaho's man-made water. Further, we do not believe that DEQ's current interpretation of Idaho's man-made water is consistent with the Clean Water Act.

We believe that any waters that are jurisdictional under the Clean Water Act and/or flow to or from waters that are jurisdictional need to be protected for all existing and/or designated beneficial uses.

If a 'man-made' or 'private' waterway, either perennial or ephemeral, is connected to any waterway that has fish in it, and the man-made or private waterway is not isolated in such a manner that the fish are physically excluded from the man-made or private waterway, then the man-made or private waterway must be presumed to have fish (an existing use) in it and needs to be protected accordingly. Further, waters downstream from a discharger to a man-made or private waterway must be protected from discharges that may impact these downstream existing or designated uses.

Similarly, if a 'man-made' or 'private' waterway flows into any waterway that has recreation occurring in it, then the man-made or private waterway must be presumed to have an impact on the recreational use (existing or designated) in the downstream connected waterway and needs to be protected accordingly.

An additional point, which is not touched on in the discussion paper has to do with monitoring. We observed in the DEQ 401 cert of the City of Star WWTP's NPDES that the DEQ does not require that a discharger monitor the receiving water to determine the presence or absence of uses. It appears to be DEQ's position that a man-made water does not contain fish or recreation as an existing use unless evidence is presented which demonstrates these as existing uses.

We believe that this approach is wrong and not compliant with the requirements of the Clean Water Act. Fishable and swimmable should be presumed present unless evidence

is presented that demonstrates their absence. Only by using this framework can uses be protected in the absence of site-specific information demonstrating that the uses are not present. This precautionary approach is the only acceptable way to proceed.

Attainability – Discussion Paper #3

We agree that only a designated use, not an existing use, may be considered for revision or removal through the use attainability process.

After a use attainability process results in the downgrading of a designated use, if, at some future date, a more stringent existing use is observed in the waterbody, we believe that DEQ must revisit the use attainability process and ensure that the newly observed more protective use is being recognized and protected for. In addition to this, the Clean Water Act contains language directing the agency to review UAAs every three years, regardless of whether or not new information has been proactively presented demonstrating new (or reestablished) existing uses.

Preliminary Draft Negotiated Rule – Proposed IDAPA Language

As a general note, we do not agree with the various additions and subtractions that DEQ is proposing to this rule to the extent that these changes are intended to enshrine the notion that man-made water and private waters do not have the presumed use protections described in subsection 101.01.

101.01 – We do not support the proposed edits to this subsection.

101.02 – We do not support the proposed edits to this subsection. We believe that man-made waters *should* have the presumed protections described in subsection 101.01

In the discussion paper on Man-made Waters, DEQ reports that existing uses are protected in man-made waters. However, the rule is silent on this. We ask that the DEQ clarify this point by adding language to this subsection that clearly states that existing uses are protected in man-made waters.

While we do not support the current proposed edits, we feel that the intent of the current language found in 102.02 is not clear.

DEQ might want to consider having another negotiated rulemaking meeting to actually discuss man-made waters, what DEQ is hoping to actually accomplish via this rulemaking, and actually engage the rulemaking participants in a dialog about this instead of just making a presentation to the group.

101.03 – We do not support the proposed edits to this subsection. We believe that private waters *should* have the presumed protections described in subsection 101.01

Further, at the last rulemaking meeting, I asked DEQ if ‘existing uses’ were protected in private waters. DEQ’s response was that they were not sure if existing uses were protected in private waters. We ask that the DEQ clarify this point by adding language to this subsection that clearly states that existing uses are protected in private waters.

102.02.a.vi – This subsection uses the term “substantial and widespread economic and social impact.” We wonder what this means. Could DEQ please define this term and provide some framework for how interested parties could demonstrate that the attainment of a beneficial use would be determined to cause ‘substantial and widespread economic and social impact?’ And could DEQ please provide the metrics that DEQ will apply when judging if ‘substantial and widespread economic and social impact’ has occurred or will occur?

102.02.d – A significant portion of this subsection is merely a restatement of the definition of “Use Attainability Analysis.” Since this term is already defined in the definitions section, including it here seems un-necessary.

102.02.e.i – the current proposed language gives the impression that a UAA is not required whenever the department designates uses that include *any* aquatic life and recreational uses. This is not correct. A UAA is required whenever the DEQ issues designated uses that require less stringent criteria than previously required. Please amend this subsection accordingly.

Additional subsection needed – 102.03.f.i – If a use attainability analysis has been conducted and designated uses have been removed or downgraded to uses that require less stringent criteria, the Department shall review the conclusions of the UAA at least every three years to determine if more protective uses have returned to the waterbody.
ii. If a use attainability analysis has been conducted and designated uses have been removed or downgraded to uses that require less stringent criteria, the Department shall revise this designation in the event that more protective existing uses are later observed in the waterbody.