

August 31, 2017

**VIA EMAIL** – [paula.wilson@deq.idaho.gov](mailto:paula.wilson@deq.idaho.gov)

Paula J. Wilson  
Hearing Coordinator  
Department of Environmental Quality  
1410 N. Hilton  
Boise, ID 83706-1255

**Re: Docket No. 58-0102-1702**

Dear Ms. Wilson:

The Idaho Association of Commerce & Industry (IACI) submits these comments to the subject proposed rule-making docket. It appears that the intent of the proposed rule is to make clear which Idaho water quality standards are in effect for purposes of Clean Water Act even if the state of Idaho has repealed such standards and adopted different standards that have not yet been approved by EPA or been specifically disapproved by EPA. We understand that this somewhat confusing concept is dictated by federal rule at 40 CFR 131.21, which is also known as the “Alaska Rule.”

Initially, we note that implementation of the Alaska Rule might be workable if EPA actually complied with the mandatory timelines in the Clean Water Act by approving or disapproving Idaho water quality submissions within 60 or 90 days, respectively. As we know this does not happen. Illustrative of this reality is Idaho’s recent adoption of revised human health criteria in 2016 which was in response to an EPA disapproval of Idaho’s prior human health criteria which took EPA over eight years to disapprove. Under the Alaska Rule, this means that Idaho’s prior human health criteria adopted in 2005 is the standard in effect for Clean Water Act purposes even though IDEQ and the Idaho Legislature have adopted two newer versions of human health criteria to be more aligned with EPA policies and the latest scientifically defensible methods. There are many additional examples of the convoluted consequences of the Alaska Rule. Thus we appreciate IDEQ’s effort in the proposed Rule to provide clarity on this confusing topic. We offer the following suggestion to sections of the proposed rule as follows.

Proposed Section 007. Effective for Clean Water Act Purposes

We recommend that this Section expand upon the description of the Alaska Rule to make clear that water quality standards approved by EPA after 2000 which are subsequently disapproved by EPA remain in effect for Clean Water Act purposes until EPA adopts a federal replacement standard. See 40 CFR 131.21(c).

Proposed Section 210.a. Table 1 Criteria for Protection of Aquatic Life (mercury)

If the intent of the proposed Rule is to make clear which numerical criteria are in effect for Clean Water Act purposes, such criteria should be specified in the Table 1 (and 2). Where appropriate, a footnote should be added to the applicable criteria notifying of a pending rule to change the criteria or proposed revision to methodologies and risk management decisions to derive criteria which are currently under consideration by EPA. Also, the criteria to protect aquatic life for total recoverable mercury

should be stated in Table 1 as opposed to in a reference to a 2004 Idaho rule-making. We understand that the proposed Idaho rule-making does not support EPA's position on the effective total recoverable mercury criteria. This understanding can be noted in a revised footnote.

Proposed Section 210.b, Table 2 Criteria for Protection of Human Health (arsenic)

We recommend that IDEQ leave the 10 ug/L arsenic criteria in proposed Table 2 (Human Health Criteria) but revise the footnote because the 10ug/L criteria is still in effect for Clean Water Act purposes. The consequence of EPA's recent disapproval of the arsenic criteria is that Idaho's current numeric human health criteria for arsenic remains in effect for Clean Water Act purposes. If EPA wishes to replace Idaho's human health numeric criteria for arsenic with replacement criteria, then it must undertake a federal rule making to do so. See 40 CFR 131.21(c). While it may be appropriate to footnote the arsenic human health criteria by noting EPA's recent disapproval, the footnote should make clear that the arsenic criteria remains in effect for Clean Water Act purposes until EPA promulgates a replacement federal standard. Currently, the arsenic footnote stipulates that EPA will use the old criteria in NPDES permitting decisions. First of all, EPA did not take the position that they would definitively use the old criteria in NPDES permitting decision in the disapproval action, likely because they would be on tenuous legal grounds to do so under the Alaska Rule. Secondly, should EPA take such position in a particular NPDES permitting action, the legality of that position can be addressed in IDEQ's 401 certification or in the comments to the draft permit. EPA's position on the old arsenic criteria, whatever it is, should not be articulated in the footnote. Therefore we request that the footnote to the current human health criteria more accurately reflect the effect of the Alaska Rule, namely that Idaho current arsenic criteria remains in effect for Clean Water Act purposes.

It appears to IACI that EPA's recent disapproval of the arsenic criteria is potentially problematic, as it seems that EPA will likely go forward with adoption of a replacement rule at some point in the future (likely 2018) which could result in adoption of the old criteria which would be .02 ug/L (orders of magnitude more stringent than the current standard). This would be concerning since it is well-known that natural groundwater quality throughout most of Idaho (and likely many surface waters) has arsenic concentration much higher than the .02 ug/L criteria.

This would likely present compliance challenges for NPDES permittees throughout the state and impose significant burdens on IDEQ in Total Maximum Daily Loads (TMDL) development. Because this appears to be a problem in the making, IACI requests that IDEQ initiate negotiated rule-making for revised human health criteria for arsenic to avoid an unreasonable and unattainable federal replacement standard. Apparently EPA is in the process of re-evaluating the science supporting the inorganic arsenic criteria which could be utilized by IDEQ during any negotiated rule-making. Similarly Idaho's most recent human health criteria which adopted state-specific and scientifically supportable fish consumption rates and risk management decisions should be considered in any future negotiated rule-making involving arsenic. IACI would like to participate in any such negotiated rule-making.

Thank you for your consideration of these comments.

Sincerely,



Alex LaBeau  
President