



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10**

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
WATER AND WATERSHEDS

June 18, 2015

Don Essig
1410 N. Hilton
Boise, Idaho 83706

RE: EPA's Comments on Idaho's Preliminary Draft #2 Negotiated Rule, Docket No. 58-0102-1501, Designating and Revising Uses, Man-made Waterways, and Private Waters

Dear Don:

EPA appreciates the opportunity to provide comments to the Idaho Department of Environmental Quality (DEQ) on revised and new rule language for designating and revising uses. EPA appreciated the chance to present information on Clean Water Act jurisdiction and Idaho's man-made and private waters provisions during the May 19, 2015 negotiated rulemaking meeting and was encouraged by the meaningful discussion that took place during the meeting. EPA hopes DEQ and the stakeholders found the information helpful. Based on conversations during the May 19, 2015 negotiated rulemaking meeting, EPA understands that DEQ will be forming a workgroup to address the issues and concerns that were raised during the May 19, 2015 meeting related to inconsistencies with DEQ's interpretation of Idaho's provisions for man-made waterways and applicable Clean Water Act requirements. EPA believes that developing a state approach for defining existing uses and designating appropriate beneficial uses for these waters is important. EPA understands that DEQ likely needs additional time to do so appropriately and acknowledges the importance of developing an approach that considers a number of factors, such as similarities and differences amongst the various different types of man-made waterways.

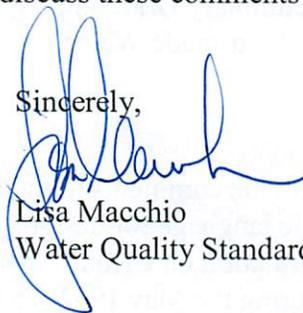
EPA has reviewed DEQ's negotiated rule, draft #2, dated May 12, 2015 and provides the enclosed comments for your consideration. EPA continues to have concerns regarding DEQ's proposed revisions to undesignated surface waters, man-made waterways and private waters provisions in Section 101. However our understanding is that DEQ is not planning to revise Sections 101 in this rulemaking. EPA appreciates the changes DEQ made to section 102 to address the concerns EPA articulated in our April 21, 2015 comment letter. However, EPA is reiterating our concern with 102.01.a.iv. and requests DEQ further consider our comment on this provision.

EPA expects the federal water quality standards regulatory revisions to be finalized and published before the end of the summer. As a result of refinements in the regulatory revision, specifically regarding designating and revising uses, EPA suggests DEQ consider this rulemaking an opportunity to align your draft rule with the upcoming regulatory revisions. More specifically, EPA recommends you consider adding language to the rule on highest attainable use. The regulatory revisions now provide clarity in rule regarding the concept of highest

attainable use. EPA believes that Idaho's rules would benefit significantly if DEQ incorporated highest attainable use language into the regulation. Clarification of this concept in rule would be likely be very helpful to DEQ as you developing accompanying guidance on these new and revised rules; specifically on determining existing uses and use attainability analyses.

EPA is encouraged by DEQ's commitment to continue working on addressing EPA's concerns, and remains committed to supporting the State's process. I appreciate the opportunity to provide you with EPA's comments and look forward to continued work with DEQ on this effort. If you have any questions or would like to discuss these comments further, please contact me at (206) 553-1834.

Sincerely,



Lisa Macchio
Water Quality Standards Coordinator

Enclosure

**EPA's Comments on Idaho's Preliminary Draft #2 Negotiated Rule
Docket No. 58-0102-1501
Designating and Revising Uses, Man-made Waterways, and Private Waters
June 18, 2015**

010. Definitions

EPA believes it would be useful for DEQ to include a definition of highest attainable use in your rule. EPA fully expects that the definition for highest attainable use as put forth in the draft revisions will be finalized as was proposed. Therefore consistent with the water quality standards regulatory revisions EPA provides the following definition for DEQ's consideration:

Highest attainable use - the modified aquatic life, wildlife or recreation use that is both closest to the uses specified in 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in 40 CFR 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability.

101. Man-made waterways and Private waters

Based on conversations during the May 19, 2015 negotiated rulemaking meeting, EPA understands that DEQ will be forming a workgroup to address the issues that were raised regarding man-made waters. Furthermore, EPA understands that DEQ is not planning to revise Sections 101.01, 101.02 and 101.0 in this rulemaking. However, given preliminary draft #2 of the rule retains revisions to sections 101.01, 101.02 and 101.03, EPA reiterates our concerns with this revised language. EPA expects states to apply CWA section 101(a)(2) "national goal" uses of fishable/swimmable to all waters of the U.S., including man-made waterways and private waters that are waters of the U.S. unless a Use Attainability Analysis (UAA) is completed to determine if those uses are not feasible and an alternate use, such as agricultural water supply alone, would be appropriate.

As you are aware, there is a federal rule in place which is still applicable for Idaho with respect to private waters (referred to in the federal rule as "excluded" waters 40 CFR 131.33(c)). DEQ's preliminary draft #2 rule language regarding private waters is not consistent with the federal rule. Therefore, if Idaho adopts the preliminary draft rule revisions, it is unlikely that EPA would withdraw Idaho from the federal rule for excluded/private waters.

102. Designation and Revision of Beneficial Uses

102.01(a)(iv):

In its April 21, 2015 comment letter EPA suggested DEQ include a statement that clearly states a UAA will be required if it is determined that a CWA Section 101(a)(2) beneficial use is not appropriate based on economic factors. This interpretation would be consistent with the Clean Water Act and its implementing regulations. DEQ did not include this clarifying language in its revised rule. Regardless of whether DEQ adds this clarification, EPA expects that DEQ will still complete a UAA pursuant to 40 CFR 131.10(j).

102.02(d)(i):

The revised rule includes language that now makes it clear that a UAA must be conducted whenever DEQ designates beneficial uses that do not include uses specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.

102.02(d)(ii):

The revised rule language clarifies that wildlife uses are included in 101(a)(2) in addition to aquatic life and recreation uses. As with 102.02(d)(i) above, the revised rule also includes language that makes it clear a UAA must be conducted whenever DEQ acts to remove a designated beneficial use that is specified by CWA 101(a)(2), similar to EPA's language in 40 CFR 131.10(j). These revisions provide the necessary and appropriate clarification.

102.02(e)(i):

DEQ has included language that now makes it clear that a UAA is not required whenever DEQ designates beneficial uses that are specified by CWA 101(a)(2) similar to EPA's language in 40 CFR 131.10(k). These revisions provide the necessary and appropriate clarification.

102.02(e)(ii):

As with 102.02 (e)(ii) above, DEQ has added language that makes is clear that a UAA is not required whenever DEQ removes beneficial uses that do not include those uses specified by CWA 101(a)(2). These revisions provide the necessary and appropriate clarification.

EPA suggests DEQ add a new provisions at 102.02(f). EPA's current regulation at 40 CFR 131.6(a) requires that each state's or tribe's water quality standards submitted to the EPA for review must include use designations consistent with the provisions of sections 101(a)(2) and 303(c)(2) of the Act. If Idaho demonstrates through a UAA that a 101(a)(2) use, or a subcategory of such a use, is not attainable, then in order to comply with this regulatory requirement, Idaho will need to adopt use designations that continue to serve the 101(a)(2) goal by protecting the highest attainable use unless it has shown that no use specified in section 101(a)(2) is attainable. EPA suggests that DEQ include language that indicatess that once it determines that a use specified in CWA 101(a)(2) is not attainable, it will adopt appropriate use designations that protect the highest attainable use for the water body. The upcoming water quality standards regulation revisions at 40 CFR 131.10.(g), will now make it clear that if a State adopts a new or revised standards based on a required use attainability analysis the State shall also adopt the highest attainable use. EPA suggests DEQ include clarifying language consistent with this requirement and consider adding 102.02(f) and the following language:

102.02(f):

When adopting a new or revised designated use based on a required use attainability analysis the Department shall also adopt the highest attainable use.