



# Idaho Water Users Association, Inc.

1010 W. Jefferson St., Suite 101 • BOISE, IDAHO 83702

OFFICE - 208-344-6690 • FAX - 208-344-2744

E-MAIL - iwua@iwua.org

WEBSITE - www.iwua.org

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June 30, 2017

**SENT VIA EMAIL (PAULA.WILSON@DEQ.IDAHO.GOV)**

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

*RE: Idaho DEQ Water Quality Standards Triennial Review  
(Public Comments – Idaho Water Users Association)*

To Whom it may concern:

The Idaho Water Users Association ("IWUA") provides the following comments on the Idaho Department of Environmental Quality's ("IDEQ") 2017 Triennial Review of the state's water quality standards.

IWUA is a non-profit corporation formed in 1937. Although originally named the Idaho State Reclamation Association, IWUA was subsequently renamed to reflect the broader-based mission of serving all water users of the State. IWUA represents approximately 300 canal companies, irrigation districts, water districts, ground water districts, municipal and public water suppliers, hydroelectric companies, aquaculture interests, agri-businesses, professional firms, and individuals – all dedicated to the wise and efficient use of the State's water resources. The purpose of IWUA is to promote, aid and assist the development, control, conservation, preservation and utilization of the Idaho's water resources. IWUA maintains a standing Water Quality Committee.

### **Clean Water Act Jurisdiction / Waters of the U.S. Rule**

On May 27, 2015, the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") issued a final rule entitled "Definition of Waters of the United States under the Clear Water Act" (the "WOTUS Rule"). The WOTUS Rule attempted to clarify which waterways fall within the jurisdiction of the Clean Water Act ("CWA").

On February 28, 2017, President Trump issued an Executive Order entitled "Restoring the Rule of Law, Federalism and Economic Growth by Reviewing the 'Waters of the United States' Rule." (Copy attached for reference). The Executive Order required that the EPA and Corps review the WOTUS Rule and mandated that the agencies "consider interpreting the term 'navigable waters' ... in a manner consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United States*." This matter is presently pending before the federal agencies as they consider revising the WOTUS Rule and its jurisdiction determinations.

Irrigation and drainage ditches do not fall within the CWA's jurisdiction. For example, Section 404(f) specifically exempts irrigation facilities from the requirement to obtain a dredge and fill permit for the construction and maintenance of irrigation ditches and the maintenance of drainage ditches. 33 U.S.C. § 1344(f)(C). Section 402(l)(1) likewise exempts irrigated agricultural return flows from the Act's point source-based NPDES permitting program. 33 U.S.C. § 1342(l)(1).

At the state level, Idaho Code Section 39-3602 further codifies the above-referenced agricultural return flow exemption and more. I.C. § 39-3602(23) (The term "Point Source" "does not include return flows from irrigated agriculture, discharges from dams and hydroelectric generating facilities or any source or activity considered a nonpoint source by definition"); *see also* IDAPA 58.01.02.078 (same). IWUA has long opposed any effort to extend CWA jurisdiction to include irrigation delivery and drainage.

The triennial review process should not be used as a means to assert jurisdiction – whether expressly or impliedly – over irrigation and drainage facilities. This is particularly true at this time, when the federal agencies are in the process of rescinding and reviewing the WOTUS Rule and CWA jurisdiction. The designation of man-made irrigation and drainage facilities for any use or protection under the CWA, threatens these express exemptions.

We are also beginning to appreciate that CWA-based jurisdictional overreach complicates (if not threatens or thwarts) creative water quality projects beneficial to NPDES point-source permittees and irrigation entities alike. For example it is well known that Treasure Valley municipalities are exploring wastewater discharge opportunities to irrigation facilities in partnership with the irrigation facility owners. These proposed discharges avoid direct discharge to the Boise River, promote substantial cost savings by avoiding the need to invest in very expensive (and comparatively inefficient)

engineered solutions at end-of-pipe, and provide reliable and needed supplemental irrigation water supply. Inventive and creative approaches to achieving TMDL and other water quality challenges on the Boise River and other similar waterbodies across the state should be encouraged rather than succumb to attempts to extend CWA jurisdiction over irrigation and drainage facilities (i.e., "man-made waterways").

### **Issue Paper #1 (Modified Aquatic Life Use for Undesignated Waters)**

From its beginnings, Idaho has been an agricultural state. Millions of acres of once desert land has been developed into world-class agricultural production. For much of southern Idaho, this would not have been possible without the construction or development of thousands of miles of canals, laterals, ditches, drains and other conveyance and drainage facilities. Idaho's agriculturally-dominated economy depends on the continued delivery and drainage of water through these facilities. Further, their operators must be able to continue to operate and maintain these complex systems as safely, efficiently, and cost-effectively as possible.

IDEQ has identified in its Issue Paper #1, the designation of uses in "certain *jurisdictional* man-made waterways." See Issue Paper #1, at 4 (emphasis added). Since irrigation and drainage facilities are not *jurisdictional*, IWUA understands that any decision on this matter will not affect the man-made irrigation and drainage systems on which Idaho's agricultural economy relies.

Idaho's irrigation and drainage facilities were created for the delivery and drainage of agricultural water. They were not created for swimming, fishing or recreational activities. See Issue Paper #1, at 3-4 ("the primary use of a man-made waterway is for the conveyance of water to and from agricultural or residential lands ... They were developed to move irrigation water and were not built with the intention of providing for aquatic life or recreation use"). These systems are operated and maintained for irrigation and drainage purposes. Given the historical development and use of these irrigation and drainage, it is contrary to regulatory authority to place any use designation on these waterways. Likewise, any encouragement of recreation in and around these facilities is dangerous and irresponsible.

The future success of these systems depends on the ability to continue operating and maintaining them as irrigation delivery and drainage facilities – not as swimming, fishing, recreational or other facilities. It is untenable that water delivery and drainage facilities may become subject to WQLS designations and/or TMDL requirements. Such obligations could cripple Idaho's agricultural economy.

Finally, to the extent any designation of man-made irrigation and drainage facilities is made, IDEQ regulations already speak to this issue. The regulations define man-made water ways as "Canals, flumes, ditches, wasteways, drains, laterals, and/or associated features, constructed for the purpose of water conveyance. This may include channels modified for such purposes prior to November 28, 1975." IDAPA 58.01.02.010.58. The regulations further direct how IDEQ should treat man-made waterways:

**Man-Made Waterways.** Unless designated in Sections 110 through 160, man-made waterways are to be protected for the use for which they were developed.

IDAPA 58.01.02.101.02. Since neither irrigation nor drainage facilities are identified or otherwise designated in "Sections 110 through 160," this regulation mandates that man-made irrigation and drainage facilities must be protected "for the use for which they were developed."<sup>1</sup> There is no basis in the regulations to designate these facilities for any other purpose (including, but not limited to, cold water aquatic life).

### **Conclusion**

Based on the language of Issue Paper #1, it is clear that the designation discussed would not affect water delivery and drainage facilities that fall under the agricultural exemptions of the CWA. Such facilities are not jurisdictional and, therefore, would not be subject to use designations.

As to man-made water delivery and drainage facilities, regulations limit IDEQ's authority to designations based on the "use for which they were developed." Since the Facilities discussed herein were "developed" for water delivery and drainage for Idaho's agricultural economy – and not for fishing, swimming, recreation, etc. – the regulations would not permit any additional use (and attendant water quality standard) designation. IDEQ must continue to make this distinction clear, and resist efforts by others to the contrary. Otherwise, additional use designation on man-made delivery and drainage facilities would place unnecessary and potentially crippling administrative burdens on Idaho's agricultural community, and likely compromise creative and mutually beneficial water quality/irrigation supplemental supply solutions.

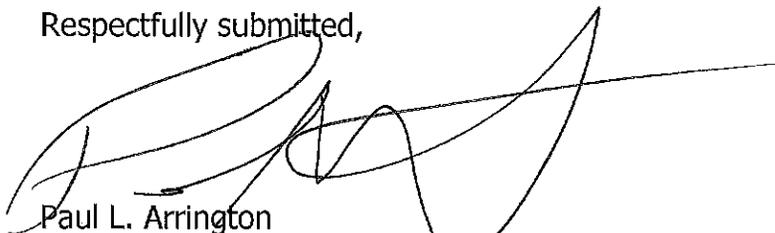
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<sup>1</sup> When these regulations were developed in 2007, IWUA did not challenge these provisions given that the plain language protected irrigation and drainage facilities for the purposes for which they were created – i.e. delivery and drainage of water.

Paula Wilson  
June 30, 2017  
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Accordingly, IDEQ should not consider adding any additional designated uses to man-made waterways.

Respectfully submitted,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Paul L. Arrington  
Executive Director & General Counsel  
Idaho Water Users Association, Inc.