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Submitted via email: paula.wilson@deq.idaho.gov and jason.pappani@deq.idaho.gov

**RE: Proposed Rule – Water Quality Docket No. 58-0102-1803 –
Allowing Additions of Heat to Temperature Impaired Waters**

Dear Ms. Wilson and Mr. Pappani,

Thank you for the opportunity to comment on the changes DEQ has made to proposed rule Docket No. 58-0102-1803 – allowing additions of heat to water bodies impaired by temperature.

Since 1973, the Idaho Conservation League has been Idaho's leading 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 30,000 supporters, many of whom have a deep personal interest in protecting Idaho's water quality and aquatic species.

Our detailed comments follow this letter. Please do not hesitate to contact me at 208-345-6933 ext. 23 or ahopkins@idahoconservation.org if you have any questions regarding our comments or if we can provide you with any additional information on this matter.

Sincerely,

Austin Hopkins
Conservation Associate

RE: Idaho Conservation League comments on Proposed Rule: Water Quality Docket No. 58-0102-1803 – Allowing Additions of Heat to Temperature Impaired Waters

Cc:

Lisa Macchio
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Contributing to CWA Violations

As stated in our previous comments, we fail to see how allowing thermal discharges into water bodies impaired by temperature would comply with the requirements of the Clean Water Act (CWA). DEQ seems to be reliant upon the “de minimis” nature of heat inputs, but we have yet to see how this scientifically and legally complies with the CWA. We raised these concerns in our previous comments submitted during the negotiated rulemaking and DEQ failed to provide a formal response to this comment. DEQ must respond to our concern prior to proceeding with this proposed rule change.

Utilization of Mixing Zones

ICL raised concerns during the negotiated rulemaking regarding how DEQ intended to implement their stated approach of distributing the 0.3°C amongst multiple discharges within a watershed. In their response to our comment, DEQ cited a 2004 letter from DEQ to the EPA detailing how DEQ planned to distribute this *de minimis* temperature throughout a watershed (DEQ, 2004). DEQ’s 2004 letter sought to clarify their intentions regarding implementation of natural background provisions, stating:

“It is our intent that the 0.3°C increase limit for temperature be applied cumulatively, i.e., this is the maximum allowable increase from all sources combined when natural background temperatures exceed applicable numeric criteria.”

In order to apply the 0.3°C cumulatively, DEQ’s letter proposes to rely on Idaho’s mixing zone policy. We have concerns with this approach and do not believe that reliance on Idaho’s mixing zone policy is appropriate in this scenario.

Idaho’s mixing zone policy (IDAPA 58.01.02.060.01.a) states:

“Mixing zones shall not be authorized for a given pollutant when the receiving water does not meet water quality criteria for that pollutant; provided, however, the Department may authorize a mixing zone when the permitted discharge is consistent with an approved TMDL allocation or other applicable plans or analyses”

This language explicitly prohibits the use of a mixing zone – in the absence of an approved TMDL – when a water body is impaired for a pollutant and lacks assimilative capacity, yet this is exactly what DEQ is proposing to do. This approach not only violates Idaho’s mixing zone policy, but also violates the Clean Water Act, which prohibits the discharge of pollutants that would cause or contribute to a violation of water quality standards. DEQ’s proposed rule would do such that by allowing thermal discharges into water bodies already violating water quality standards.

In light of all this, DEQ’s approach seems at odds with applicable laws, rules and regulations. As such, DEQ should modify their proposed rule and associated

implementation strategy such that it complies with all applicable laws, rules and regulations.

Defining Natural Background Conditions

IDEQ is proposing a process that would define the “natural background” temperature of a water body, then allow point sources to add a 0.3°C thermal load to this calculated value. We foresee this approach being problematic and suggest that IDEQ only utilize the numeric criteria as the regulatory value to which a 0.3°C thermal load is allowed to be added.

The state of Oregon attempted to utilize a similar approach in which natural background was calculated and utilized as a baseline condition. This approach was challenged and ultimately struck down by the court, which ordered EPA to remedy the issue. See *NWEA v. EPA*, 2012.¹ The court found that EPA’s approval of Oregon’s Natural Conditions Criteria for temperature (NCC) was arbitrary and capricious based on, among other things, the following:

(1) the NCC "supplants rather than supplements" the Biologically Based Numeric Criteria, Opinion and Order at 26; (2) the NCC was based on a flawed assumption that historically protective water temperatures would protect salmonids now, *id.* at 27; (3) the NCC attempts to restore historically higher water temperatures without restoring other conditions that previously allowed salmonids to thrive, *id.*; and (4) there are "difficulties of estimating the historical water temperatures upon which the NCC depends," which is a "process rife with uncertainty."²

Idaho should heed the lessons learned by Oregon and avoid making the same mistakes. The basis for this proposed change has been rejected by a federal court and disapproved by EPA in a sister-state; thus it is inappropriate and inefficient for Idaho to pursue the same approach that has been previously tried and objected to by the federal courts.

Demonstration of Protecting Beneficial Uses

This proposed rule, if ultimately approved, would effectively change the numeric criteria for temperature on a case-by-case basis. As such, DEQ must have a process for demonstrating that this new standard (i.e. – 0.3°C above WQS or natural background) remains protective of beneficial uses. We request that DEQ please explain what their process will be for making such a demonstration. If DEQ has yet to formalize a process then it would be prudent to postpone this rulemaking until such a time that DEQ has the necessary provisions in place to satisfy all requirements of the CWA.

¹ *NWEA v. EPA et al.*, Case No. 3:05-cv-01876-AC, 2012

² *Id.*