



Association of Idaho Cities
3100 South Vista, Suite 310, Boise, Idaho 83705
Telephone (208) 344-8594
Fax (208) 344-8677
www.idahocities.org

June 26, 2015

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

(filed by email to paula.wilson@deq.idaho.gov)

RE: Association of Idaho Cities Comments on Idaho Pollutant Discharge Elimination System Draft 1-6

Dear Ms. Wilson,

The Association of Idaho Cities (AIC) was founded in 1947 and is a nonpartisan, nonprofit corporation owned, organized, and operated by Idaho's city governments. The organization serves to advance the interests of the cities of Idaho through legislative advocacy, technical assistance, training and research. AIC is actively engaged in water quality issues through the work of our Environment Committee, chaired by Boise City Councilmember Elaine Clegg.

Idaho cities play an important role as the primary implementers of the Clean Water Act and have a significant interest in the development of rules and guidance for the Idaho Pollutant Discharge Elimination System permit program. AIC recognizes that the Clean Water Act anticipated states as the primary implementers of the Act and is on record as supporting development of an EPA approvable IPDES Application. AIC has developed general and specific comments that are attached for consideration by the Idaho Department of Environmental Quality.

AIC appreciates the opportunity to comment on the draft IPDES sections and looks forward to working with our state and federal partners to implement programs to protect the environment and human health. Should you have questions concerning our comments, please feel free to contact me.

Sincerely,



Seth Grigg

Executive Director

Cc: Elaine Clegg, AIC Environment Committee Chair

Association of Idaho Cities Comments on IPDES Draft Discussion Papers Number 1-6

June 26, 2015

1. Discussion Paper 1-4 (June 5, 2015 Draft)

Waters of the State versus Waters of the U.S.

Throughout combined drafts 1-4, the draft rule uses Waters of the State (WOS) and Waters of the United States (WOTUS) interchangeably. The definition of WOS (#109 in definitions section) includes groundwaters, private waters, and other waters (e.g. upland canals with no tributary connection to WOTUS) that are outside of Clean Water Act jurisdiction based on the final rule released by EPA on May 27, 2015 but not yet published in the Federal Register. Because Waters of the State are defined more broadly than Waters of the United States, and only Waters of the United States are subject to Clean Water Act permitting under the National Pollutant Discharge Elimination System permits program or in the future under an EPA approved Idaho Pollutant Discharge Elimination System permit program, the rule needs to clarify that only Waters of the United States are subject to permitting and that some of the Waters of the State are not subject to permitting. The following is a list, including but not limited to, the sections of Drafts 1-4 that appear to require modification:

- i. Legal Authority (page 3).
Second “waters of the state” in this section should be WOTUS.
- ii. Incorporation by Reference: 3.bb.iv (page 5).
Replace “...the term waters of the state of Idaho” with “WOTUS.”
- iii. Definitions: 10.09: Best Management Practices (page 7).
While the application of BMPs to WOS in sentence one appears to be appropriate, the application of BMPs in sentence two of this section only applies to WOTUS.
- iv. Definitions: 10.23: Direct Discharge (page 8).
The proposed direct discharge definition all WOS and should only apply to WOTUS.
Replace WOS with WOTUS.
- v. Definitions: 10.27.b.: Discharge of pollutant (page 8).
Replace WOS with WOTUS.
- vi. Definitions: 10.89: Silvicultural Point Source (page 14).
Review use of WOS, appears that it should be WOTUS.
- vii. Definitions: 10.100: Toxic Pollutant (page 15).
Replace WOS with WOTUS.
- viii. Definitions: new 10.110: Waters of the U.S. page (page 16).
Add WOTUS to definitions (new 110, renumber current 110-114 to 111-115).
- ix. Definitions: existing 10.110: Water Pollution (page 16).
Replace WOS with WOTUS for both occurrences.
- x. Definitions: existing 10.112: Water Transfer (page 16).
Replace WOS with WOTUS

- xi. Exclusion from Permits: 102.02 (page 20).
Replace WOS with WOTUS.
- xii. Exclusion from Permits: 102.02.a.ii.(3) (page 20).
Check to see if WOS should be replaced by WOTUS.
- xiii. Exclusion from Permits: 102.02.b (page 20).
Replace WOS with WOTUS.
- xiv. Pre-application Process: 104 (page 21).
Replace WOS with WOTUS.
- xv. Application for an Individual Permit: 105.11.b.(9)(viii) page 34; 105.11.b.(9)(viii)(1) page 34; 105.11.d(7)(ii) page 36; 105.11.d(7)(iii) page 36 ; and 105.11.f (page 36).
Replace WOS with WOTUS.
- xvi. Permit Application Requirements for Municipal Separate Storm Sewer Discharges: 105.18, 105.18.b.iii(2) twice (page 56); 105.18.b.iv(2)(a) twice (page 57).
Replace WOS with WOTUS.
- xvii. General Permit Administration: 130.05.c.vii(1) page 73; and 130.05.c.vii(3) page 73.
Replace WOS with WOTUS.
- xviii. Calculating Permit Provisions: Intake Credits 303.07.a.i (page 94).
Replace WOS with WOTUS.
- xix. Calculating Permit Provisions: Disposal of Pollutants into wells, POTWs or Land Application: 303.09.a twice (page 96), 303.09.a.i (page 96), 303.09.a.ii twice (page 96).
Replace WOS with WOTUS.

2. Stormwater Definition.

The proposed definition of *Storm Water* is: “Runoff, snow melt...” The federal definition of *Storm Water* is “Storm water runoff, snow melt...”

The proposed definition appears to be a more broad definition of stormwater because it is not limited to storm water runoff. The federal definition is consistent with the definition of all existing MS4 permits issued in the state of Idaho.

AIC recommends that the proposed IPDES program use the federal definition of stormwater see 40 C.F.R. 122.26(b)(13).

3. Municipal Separate Storm Sewer System (MS4) Definition.

The proposed rule does not contain a definition of Municipal Separate Storm Sewer System (MS4). The Code of Federal Regulations defines large, medium, and small MS4 at sections 40 C.F.R. 126.b(4), 40 C.F.R. 126.b(7), and 122.32 respectively.

AIC suggests that the 40 C.F.R. 126 definitions of large and medium MS4 and the 40 C.F.R. 132 definition of small MS4 be added to the definitions section of the proposed rule.

4. Waters of the United States Definition.

The proposed rule does not contain a definition of “Waters of the United States.”

AIC suggests the draft rule include the federal definition of “Waters of the United States” found at 40 C.F.R. 122.2.

5. Incorporation of NPDES Rules by Reference.

AIC understands the three options proposed in the discussion paper and supports the Idaho Department of Environmental Quality (IDEQ) proposed use of the hybrid approach of adoption by reference of federal rules for reasons of cost effectiveness and development some rules to incorporate important aspects of the rules that are Idaho specific or which are not currently included in existing federal rules.

6. Section 100.01: Rights.

The second sentence of this section is a confusing restatement of the key elements contained in the first sentence and implies that additional permits and agreements are necessary. The second sentence adds nothing substantively, that is not already addressed in the first sentence.

AIC recommends that the second sentence be stricken.

7. Section 102.01: Obligation to Obtain an IPDES Permit.

The draft rule indicates that a permit is required for a discharge to “surface waters of the state.” The definition of waters of the state is broader than and includes waters that are not subject to NPDES permit obligations (e.g. groundwaters).

We believe that IDEQ’s obligation and intention is to issue IPDES permits to Waters of the United States.

AIC suggests that the draft rule section 102.01 be modified to read:

“Any person who discharges or proposes to discharge a pollutant to a water of the United States, ...”.

8. CWA Section 316 (a & b).

AIC appreciates and supports the inclusion of CWA Section 316(a) thermal variances and CWA Section 316(b) cooling water intake provisions in the proposed rules.

Section 316(a) of the CWA applies to all point sources with thermal discharges and EPA requires or recommends CWA Section 316(a) elements in multiple NPDES processes (e.g. applications, fact sheets, permits, public notice, state water quality standards, impaired water listings,

temperature TMDL development...). Because compliance with temperature water quality standards is anticipated to be a challenging IPDES issue, AIC suggests that a complete review of the draft rules, state water quality standards, and development of implementation guidance for CWA Section 316(a) be included to ensure the state has all of the authorities, definitions, procedures, and processes to adequately implement this section of the Act.

Section 316(a) authorizes the NPDES permitting authority to impose alternative effluent limitations for the control of the thermal component of a discharge in lieu of the effluent limits that would otherwise be required under sections 301 or 306 of the CWA. Regulations implementing section 316(a) are codified at 40 C.F.R. Part 125, subpart H.

These regulations identify the criteria and process for determining whether an alternative effluent limitation (i.e., a thermal variance from the otherwise applicable effluent limit) may be included in a permit and, if so, what that limit should be. This means that before a thermal variance can be granted, 40 C.F.R. §§ 125.72 and 125.73 require the permittee to demonstrate that the otherwise applicable thermal discharge effluent limit is more stringent than necessary to assure the protection and propagation of the waterbody's balanced, indigenous population (BIP) of shellfish, fish and wildlife.

40 C.F.R. § 125.71(c) defines the BIP as:

“a biotic community typically characterized by diversity, the capacity to sustain itself through cyclic seasonal changes, presence of necessary food chain species and by lack of domination by pollution tolerant species. Such a community may include historically non-native species introduced in connection with a program of wildlife management and species whose presence or abundance results from substantial irreversible environmental modifications. Normally however, such a community will not include species whose presence or abundance is attributable to the introduction of pollutants that will be eliminated by compliance by all sources with section 301(b)(2) of the Act; and may not include species whose presence or abundance is attributable to alternative effluent limitations imposed pursuant to section 316(a).”

IDAPA rule should include CWA Section 316(a) information in the definitions section, rule, and the application for point sources with thermal discharges, which would be particularly useful for facilities that may have received numeric permit limits and schedules of compliance that cover more than one permit cycle and are considering, seeking, or have already obtained a CWA Section 316(a) variance and are reapplying for CWA Section 316(a) variance. Because a CWA Section 316(a) variance is a permit condition and not a permit limit, EPA suggests that:

“With respect to renewal of a prior section 316(a) thermal variance, it is essential that permitting authorities require applicants to provide as much of the information described in 40 C.F.R. § 125.72(a) and (b) as necessary to ¹demonstrate that the alternative effluent limit assures the protection and propagation of the BIP 40 C.F.R. § 125.72(c). Such information may include a description of any changes in facility operations, the waterbody, or the BIP since the time the variance was originally granted.”

¹ Implementation of Clean Water Act Section 316(a) Thermal Variances in NPDES permits (Review of Existing Requirements), James A Hanlon, October 28, 2008, 4 p <http://www.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR-338.pdf>

The State of Wisconsin has a recently modified water quality standards (2010)² and created guidance (2013)³ for implementation of temperature requirements for point sources. There are five logic diagrams in the guidance that are particularly useful in understanding how the permit application process incorporates CWA Section 316(a) elements for Wisconsin point source dischargers. AIC encourages IDEQ to review the state water quality standards (IDAPA 58.01.02) to ensure they contain adequate authority to grant a 316(a) variance and include 316(a) guidance development in the list of items that need to be completed prior to the September 2016 legislative deadline for submittal of a complete IPDES application package.

EPA⁴ identifies additional permit and fact sheet requirements for 316(a) thermal variances, including:

“NPDES permits containing a 316(a) thermal variance must include a fact sheet that complies with the general requirements of 40 C.F.R. § 124.8. Among other things, the fact sheet must explain why the permitting authority believes any section 316(a) thermal variance included in the permit is justified, and it should contain a summary of any 316(a) thermal variance history from previous permits, if applicable (e.g., dates, determinations, limitations, etc.), as well as the basis for continuing the 316(a) thermal variance in the present permit.

A 316(a) thermal variance is an NPDES permit condition. It, therefore, expires along with the permit. A permittee may request a renewal of its 316(a) thermal variance prior to the expiration of the permit. Any discharger holding a 316(a) thermal variance should be prepared to support the continuation of the variance with studies based on the discharger’s actual operation experience (See Note following 40 C.F.R. 125.72).”

EPA⁵ identifies public notice elements for permittees requesting a 316(a) variance (40 C.F.R. 124.57 and 40 C.F.R. 124.10(d)(1)), including two additional requirements:

1. A statement that the thermal component of the discharge is subject to effluent limitations under CWA sections 301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under Section 301 or 306, and

² **NR 106.51 Applicability.** This subchapter applies to point sources that discharge cooling water, non-contact cooling water, or other wastewater to surface waters of the state if the discharge contains an associated heat load or is elevated in temperature relative to the ambient temperature of the receiving water. The procedures for calculation of effluent limitations identified in this subchapter do not apply to storm water discharges. Effluent limitations determined under this subchapter supersede any temperature limitations listed in s. NR 104.06 (2) (b). **Note:** Section 283.11 (2) (b), Stats., states that rules concerning storm water discharges may be no more stringent than the requirements under the federal water pollution control act and regulations adopted under that act. Storm water pollution prevention plans may address thermal issues on a case-by-case basis. **Note:** The department will use enforcement discretion whenever there are exceedances of effluent temperature limitations in a WPDES permit for an electric generating facility during an energy emergency warning or when an energy emergency event has been declared under a Federal Energy Regulatory Commission order (Standard EOP-002, North American Electric Reliability Corporation). **History:** CR 07-111: cr. Register September 2010 No. 657, eff. 10-1-10

³ Guidance for Implementation of Wisconsin’s Thermal Water Quality Standards, August 2013, 189 pages, Wisconsin Department of Natural Resources <http://dnr.wi.gov/topic/SurfaceWater/documents/ThermalGuidance2edition8152013.pdf>

⁴ Implementation of Clean Water Act Section 316(a) Thermal Variances in NPDES permits (Review of Existing Requirements), James A Hanlon, October 28, 2008, 4 p <http://www.epa.gov/region1/npdes/merrimackstation/pdfs/ar/AR-338.pdf>

⁵ Ibid.

2. A statement that a Section 316(a) request has been filed and that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under Section 316(a) and a brief description, including a quantitative statement, of the alternative effluent limitations, if any, included in the request.

Temperature Provisions Consistent with Section 316(a) and C.F.R. 130.7(c)(2) of the Act.

Throughout the draft rule, there are sections that address effluent limitations that do not include section 316(a). Additionally, existing state Integrated Report and Thermal TMDL processes, procedures, and guidance do not appear to incorporate CWA Section 316 and (40 C.F.R. 130.7(c)(2)) consideration of balanced aquatic populations for thermal listings of waters or developing Thermal TMDLs as required by the Act. It appears that other portions of the State's Water Quality programs do not include inclusion of section 316(a) provisions of the Act for point sources and should be reviewed and modified as necessary to be consistent with Clean Water Act Section 316 elements and EPA Thermal TMDL regulations.

AIC recommends that the draft rule include or that IDEQ reviews the draft rule for:

- Include: Definition of "Balanced Indigenous Population" identical to the federal definition at 40 C.F.R. § 125.71(c) in the IPDES and state water quality standards definitions sections. The definition currently is adopted by reference in the proposed rule, but would require specific knowledge of the existence of Section 316 of the Act that the existing Idaho standards do not address and therefore are not transparent to many NPDES permittees, non-governmental organizations, and the public.
- Include 316(a) questions/information per EPA recommendations in permit applications (e.g. is the applicant seeking or has the applicant been granted and is reapplying for a CWA Section 316(a) or (b) variance).
- Include additional permit and fact sheet requirements for Section 316(a) as identified by EPA.
- Review of the state water quality standards, the Integrated Report thermal listing process, procedures, and guidance, and the thermal TMDL development processes and guidance to include the appropriate CWA 316(a) and 40 C.F.R. 130.7(c)(2) elements, conditions, and processes.
- Review section 302.03 to determine if a new section at 302.03.d is necessary to authorize thermal variances consistent with CWA Section 316.
- Review section 302.04.e to determine if it needs to be modified to include 316(a) as well as 316(b) as another effluent limitation or standard.
- Review section 303.10 to determine if new sections are necessary for the calculation of limits for facilities with section 316(a) thermal variances and/or cooling water intake structures (316(b)).

- Review section 310.02 to determine if language identical to section 310.01.e is necessary in this section.
- Review section 310.05.a to determine if the last “and” in this section should be “or”. The language appears to authorize thermal variances only for cooling water intake structures and not thermal variances for other permittees without cooling water intakes.

9. Upset.

AIC appreciates the proposed upset definition and provisions contained in the draft rule and believes that they are consistent with the Act, prior EPA actions, and federal rules. Because many water quality based limits are contained in permits and biological processes to meet these limits are sensitive to variation in influent, temperature, and other factors out of the control of the POTW, some states have extended the upset provision to water quality based limits using the same approach as for conventional pollutants.

In 1982, the agency proposed to extend the upset defense to violations of water quality based limits. 47 Fed. Reg. at 52,089. The defense would be allowable to permittees who could demonstrate that despite the upset, instream water quality standards were not exceeded. The very conservative nature of stacking conservative assumptions (e.g. design flow, 7Q10, 90-95% effluent concentration; 95-99% receiving water concentration for temperature/pH/hardness....) results in limits that are very conservative and likely to be over protective in essentially all real life discharge situations (e.g. properly managed utilities always have additional capacity; combined worst case assumptions for all parameters is a statistically improbable circumstance...). The upset defense for violations of water quality based limits, while consistent with the Act, was not adopted as a final rule.

In 1988, the U.S. Court of Appeals for the D.C. Circuit ruled that EPA’s refusal to extend the upset defense to water quality based permit limits was arbitrary and capricious (see *Natural Resources Defense Council v. EPA*, 859 F.2d 156, 209-10 (D.C. Cir. 1988)).⁶ Upon remanding the regulation to the agency, the court specifically stated that it did not mean to imply that EPA must allow the defense for water quality based limitation, only that if the agency decides not to extend the defense, it must provide a reasoned basis for its decision.⁷ Our understanding is that the Agency has not promulgated rules that limit the use of the upset provision to conventional pollutants, and therefore the extension of upset provisions to technology and water quality based limitations, as implemented in other state water quality standards and approved by EPA is consistent with the Act.

⁶ Environmental Law Handbook, Bell, C.L et al, 2013

⁷ Ibid

Some states with EPA authorized NPDES programs allow upset defense for any limitation contained in a permit (e.g. Minnesota,⁸ Wisconsin,⁹ and Florida¹⁰), while others do not (e.g. Oregon, Washington, Alaska). States are allowed to be more stringent than the Act.

AIC strongly supports the IPDES rules providing an upset defense for both technology and water quality based limitations.

10. Water Quality-Based Requirements and Guidance

AIC supports the incorporation of both technology and water-quality based permit conditions to meet the goals of the Clean Water Act. Draft sections of the rule include all of the rule language necessary to do that; however, do not describe or address guidance on how the State of Idaho intends to establish these limitations (e.g. EPA Technical Support Document or State Technical Support Document for the development of water quality based toxics). EPA provides States significant flexibility in the policy choices for assumptions and conditions used to determine water quality based conditions and the use of appropriate approaches and assumptions in the development of WQBELs is of significant interest to permittees and the public.

Because IDEQ has indicated it will develop state level guidance for development of WQBELs, AIC would encourage IDEQ to include references to state guidance in the appropriate sections of the rule (e.g. 302.04, 302.06, 302.07, new 302.08...).

11. Authorization for Trading

AIC appreciates and strongly supports the authorization for water quality trading included in the draft rule at 302.20. AIC believes that this is an essential element in the permitting and TMDL landscape now and in the future as demonstrated by the recent June 5, 2015 draft Lower Boise

⁸ Draft permit language from City of Welcome Wastewater Treatment Facility draft permit, April 3, 2015

http://www.pca.state.mn.us/index.php?option=com_k2&id=3177_439e64cc07169acec52f7f8a2ff527d4&task=download&view=item

Upset Defense. In the event of temporary noncompliance by the Permittee with an applicable effluent limitation resulting from an upset at the Permittee's facility due to factors beyond the control of the Permittee, the Permittee has an affirmative defense to an enforcement action brought by the Agency as a result of the noncompliance if the Permittee demonstrates by a preponderance of competent evidence: a. The specific cause of the upset; b. That the upset was unintentional; c. That the upset resulted from factors beyond the reasonable control of the Permittee and did not result from operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventative maintenance, or increases in production which are beyond the design capability of the treatment facilities; d. That at the time of the upset the facility was being properly operated; e. That the Permittee properly notified the Commissioner of the upset in accordance with Minn. R. 7001.1090, subp. 1, item I; and f. That the Permittee implemented the remedial measures required by Minn. R. 7001.0150, subp. 3, item J.

⁹ Personal communication, March 30, 2015, Keith Pierce, Acting Wastewater Section Chief, WDNR.

¹⁰ South Florida Water Management District permit:

http://www.dep.state.fl.us/secretary/news/2012/06/npdes_watershed_permit_consent_order.pdf

Permit provisions that extend to any limitation (e.g. WQBEL or reuse) "Any upset which causes any reclaimed water of the effluent to exceed any limitation in the permit."

Upset Provisions:

- a. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed contemporaneous operating logs, or other relevant evidence that:
 - (1) An upset occurred and that the permittee can identify the cause(s) of the upset;
 - (2) The permitted facility was at the time being properly operated;
 - (3) The permittee submitted notice of the upset as required in Condition VIII.20 [notification requirements] of this permit; and
 - (4) The permittee complied with any remedial measures required under Condition VIII.5 [duty to comply/limitations on liability] of this permit
- b. In any enforcement proceeding, the burden of proof for establishing occurrence of an upset rests with the permittee.
- c. Before an enforcement proceeding is instituted, no representation made the Department review of a claim that non-compliance was caused by an upset is final agency action subject to judicial review. [62-620-610(23, F.A.C.)]

Phosphorus TMDL. The draft TMDL contains no reserve for growth for any point sources with the anticipation that all future growth will come from discharges at the TMDL water quality target (100 ug/l TP) or a combined treatment plus trade approach.

12. Intake Credits

AIC appreciates and supports the inclusion of intake credits in the determination of IPDES limitations contained in the draft rule at 303.07. AIC believes that intake credits will be particularly useful for toxics. However, the proposed provision only provides credits for facilities that withdraw source waters from the same waterbody that they discharge to. In Idaho, groundwater provides 95% of the drinking water¹¹, which might be higher or lower for specific pollutants than surface waters due to natural or geologic conditions. Across the state, groundwater is the primary source of potable water used by public and industrial sources, and under the draft Intake Credit language, should also be available as an intake credit.

AIC recommends that the language be modified to include all sources of potable waters, including groundwaters, so this important implementation tool is available to all IPDES permittees instead of only those few that have the same source and receiving waters.

13. Schedules of Compliance

AIC appreciates and supports the inclusion of revised language at 305.01.f to the Schedules of Compliance (SOCs) approach for IPDES permits.

Schedules of Compliance (SOC) have been suggested by IDEQ as one of ten implementation measures in the Fish Consumption Rulemaking that is currently ongoing. The conventional SOC is treatment plant improvement based with definable construction steps and schedules and generally have not extended beyond two permit cycles. However, the use of SOC for toxic pollutants, some of which can have very low and non-attainable water quality goals (e.g. current Oregon 0.03 mg/kg Methylmercury, Idaho 64 parts per quadrillion criteria for PCBs...), significantly complicate some of the proposed provisions for SOC (e.g. reasonable progress; projected completion date...) use as an effective tool in the IPDES program.

For example, it is likely that Idaho will adopt toxics criteria that are lower for highly bioaccumulative pollutants, or if a discharger in Idaho discharges to waters that flow into Oregon, compliance with the Oregon Mercury fish tissue criterion is highly unlikely regardless of timeframe because of existing U.S. and global anthropogenic emissions of mercury and the global circulation and deposition of mercury to Idaho lands and waters. Similar difficult criteria for legacy pollutants (e.g. PCBs, eldrin, DDT, Di Ethyl Hexyl Phthalates (DEHP), and PBDEs), some that have been banned in the 1970's, but still persist in the environment or some pollutants that are still produced and have widespread use in many consumer products (DEHP) or are allowed in U.S. food and other materials (PCBs) at levels millions or billions of times higher than the water quality standard, further complicate the implementation of toxics criteria and the use of SOC as an implementation tool.

¹¹ IDEQ Ground Water Idaho website, <https://www.deq.idaho.gov/water-quality/ground-water/>

Some Idaho municipal permittees already have implemented and achieved significant mercury reductions. At some point, the facilities with the best and most successful toxics reduction programs will no longer be able to make additional reductions and simply do not have the regulatory authority to effect regional, national, or global anthropogenic reductions necessary to meet ambient water quality standards or determine the timeframe necessary for the criterion to be met.

There are also naturally occurring elevated arsenic and selenium concentrations in the western United States (including Idaho) and areas with legacy mining that create significant compliance and SOC challenges (e.g. lead, cadmium, and zinc in the Silver Valley of Idaho with 20 year SOCs) that are very difficult to address.

AIC appreciates and supports the draft language modification to include the use of SOCs for conventional and non-conventional (e.g. global and legacy toxics) pollutants (e.g. removal of the new pollutant only use of SOCs) proposed at the June 12, 2015 meeting. SOCs are an important compliance tool that can be used effectively in the long or short term based on the type of permitting challenge that needs to be addressed.

14. Variances.

AIC appreciates and supports the use of variances as an important Clean Water Act tool to address difficult water quality based permit issues, including the use of section 316(a) variances for thermal discharges from point sources included in the Act.

AIC supports, due to the nature of some pollutants, variances granted on a watershed (e.g. Silver Valley) or statewide basis (e.g. mercury, arsenic, PCBs...) and encourages IDEQ to include approaches other than permit by permit for application in the IPDES rules and state water quality standards programs where appropriate.

15. Section 5: IPDES Fees.

AIC supports the proposed joint state, federal, and fee based funding method for implementation of the IPDES program. AIC is particularly supportive of the 60% state funding level, primarily as an economic development tool for all Idaho municipalities, and particularly for small and medium sized cities.

16. Section 6: Permit Appeal Options.

During the June 12, 2015 IPDES meeting, IDEQ presented two basic questions to the negotiated rulemaking group:

- What Type of IPDES Appeal Process Should be Used: Record or Adjudicatory?
- What Individual or Body Should Hear the Appeal?

AIC appreciated the options, advantages, disadvantages, and IDEQ preference expressed in Draft Paper #6 and the presentation on June 12.

Concerning the type of appeal process, AIC supports the IDEQ preference of a record based appeal for the reasons IDEQ identified in the Draft Paper and presentation.

Concerning the individual or body hearing the appeal, AIC supports the creation of a new IPDES Appeals Board composed of three members, similar to EPA's Environmental Appeals Board. The IPDES Appeals Board should be composed of individuals who have expertise in surface water and IPDES matters, but do not have conflicts of interest (e.g. derive income from sources with IPDES discharges), and that are appointed by the IDEQ Board.

17. Important IPDES Implementation Opportunities Not Contained in the Current Proposed Rules.

a. Watershed Based and Bubble Permitting:

Watershed-based NPDES permitting is a process that emphasizes addressing all stressors within a hydrologically-defined drainage basin, rather than addressing individual pollutant sources on a discharge-by-discharge basis. Watershed-based permitting can encompass a variety of activities ranging from synchronizing permits within a basin to developing water quality-based effluent limits using a multiple discharger modeling analysis. The type of permitting activity will vary depending on the unique characteristics of the watershed and the sources of pollution impacting it. The ultimate goal of this effort is to develop and issue NPDES permits that better protect and maintain or restore biological function within entire watersheds. In 2007, EPA published guidance for watershed based permitting¹² and EPA has conducted watershed based permitting in Idaho (eleven concurrent NPDES permits issued to municipal wastewater and industrial discharges in the lower Boise watershed in 1999).

Bubble Permitting is also a tool available to the IPDES program that provides innovative and cost effective strategies to comply with nutrient or other pollutants and have been used in the Tualatin watershed for both the wastewater and stormwater discharge permits issued to Clean Water Services and has been discussed as a tool to implement the Spokane Nutrient TMDL. Bubble permitting also may accelerate environmental compliance by providing additional incentives for over compliance and is frequently associated with trading.

Watershed based and Bubble Permitting are two tools that IDEQ should use to address difficult nutrient or toxic pollutant water quality challenges (e.g. Watershed based TMDLs) across the state in a more effective and cost efficient manner.

AIC encourages the IPDES program to incorporate and implement both watershed based and bubble permitting as foundational tools to efficiently and cost effectively implement IPDES permits and achieve watershed based challenges more quickly and cost effectively.

¹² http://water.epa.gov/polwaste/npdes/basics/upload/watershed_techguidance.pdf

18. IPDES Rulemaking Schedule.

AIC recognizes that the IPDES rulemaking schedule is very aggressive. AIC remains supportive of the IPDES authorization process; however, important issues that provide flexibility, cost effectiveness, and accelerated compliance with environmental goals (e.g. IPDES Technical Support Document for Toxics Control; IPDES Thermal Variance Technical Support Document; Watershed and Bubble Permit Policy/Guidance...) are important elements to include at the inception of the program.

AIC is concerned that if there is a rush to authorization, with the promise of changes during implementation, that ten or twenty years down the road the potential efficiencies and opportunities of efficient and cost effective rollout of the IPDES program will have been forgone. Or put more plainly, a thoughtful and robust IPDES rulemaking and guidance development process is better than fast IPDES rulemaking for the IPDES permittees, non-governmental organizations, public, and state of Idaho.

AIC recognizes the IPDES schedule was developed in response to a statutory deadline and the enormous amount of work that needs to be done to pull together the rules, regulations, policies and guidance to run an effective and efficient IPDES program.

AIC would be willing to work with IDEQ, other interested stakeholders, and if necessary the Legislature, to provide additional time to complete this very important task of developing IPDES rules, regulations, guidance, and policy necessary to implement an effective, efficient, and successful IPDES program.