



July 25, 2014

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RE: ITD Comments on Mixing Zone Negotiated Rulemaking Draft No. 4

The Idaho Transportation Department (ITD) submits the following comments on the DEQ's Mixing Zone Policy Draft No. 4. Financial resources for the state DOT are very constrained and infrastructure investment needs in Idaho are very high. It is critical funds are used efficiently and with clear benefit to the resource. DEQ's Mixing Zone Policy has substantial fiscal impacts to ITD's business operations and contract administration. We appreciate the opportunity to comment.

ITD Business Practices

ITD constructs large complex bridge projects in or immediately adjacent to major waterways in Idaho. These projects are all completed with a primary purpose of promoting economic and social development in Idaho. The in-water construction work and dewatering often associated with these complex bridge projects frequently require extensive water quality monitoring and pollution control BMPs. Often construction, engineering, and geomorphological constraints make it impossible to meet water quality standards for turbidity immediately down-current of the project. Regularly, entire projects are shut down due to a brief turbidity exceedance. Additionally, contractually requiring implementation of DEQs water quality monitoring and having a decisive understanding of when a project is in compliance or out of compliance can be very challenging as the requirements are currently written. ITD believes that a mixing zone allowance for General Permits and Individual §404 permits, or at least some flexibility in determining Compliance Point sampling based on site specific conditions would reduce many of the current contractual and regulatory challenges we face.

Most challenging for ITD is working directly in and disturbing the stream bed while installing and removing coffer dams, dewatering and working inside of coffer dams, while driving bridge pilings, and while placing or moving rip-rap. Even with the most extensive pollution controls in place, it is often impossible to meet turbidity standards immediately downstream of the project disturbance and in the visible plume generated by this work. However, typically a very short distance downstream from the project, between the project's pollution controls and the natural mixing in the receiving water, turbidity standards are met, indicating very insignificant impacts to the receiving water in duration, extent, and intensity.

ITD believes if DEQ incorporated a mixing zone Policy for General Permits and Individual §404 Permits, or at least considered some flexibility in Compliance Point sampling that allowed for consideration of project specific and receiving water specific factors (i.e. compliance points determined based on receiving water, project, and seasonal conditions), these complex civil projects could be constructed in a way that; 1) Made compliance more attainable therefor reducing the risk or regulatory actions against ITD and contractors, 2) Were more cost effective and therefore a more efficient use of taxpayer resources, and 3) Result in no long term adverse changes to water quality or designated beneficial uses of a receiving water.

Regulatory Scenarios

Four scenarios can dictate compliance monitoring requirements on ITD construction projects. Some projects operate under as many as 3 of these scenarios at any given time, or some scenarios change throughout the duration of the project.

1) DEQ §401 Certification of an Individual 404 Permit

There is fairly wide variability in the compliance monitoring required by DEQ based on the project and DEQ Regional office issuing the §401 Certification. A few examples of language paraphrased from past certifications issued include:

- A. Monitoring shall be done at the point of discharge and within any visible plume at a point closest to its source. A properly and regularly calibrated turbidimeter is required.
- B. Turbidity monitoring must be conducted and recorded. Monitoring must occur each day during project implementation. A properly and regularly calibrated turbidimeter is recommended.
- C. Monitoring must occur each day during project implementation when project activities may result in turbidity increases above background levels. A properly and regularly calibrated turbidimeter is required. Monitoring must occur every two hours approximately 100 feet down-current from the in-water disturbance or point of discharge and within any visible plume.
- D. Because of the size of this project, no turbidity monitoring is required. However, ITD and/or its contractor must ensure that the project activity will be conducted in a manner that will not violate water quality standards for the Big Wood River. Additionally, the contractor and ITD have determined that turbidity plumes created during the 2010 work in the Big Wood River in live water without sediment controls or instream diversions/barriers were visually observed to have dissipated in less than 500 feet (measurement was not required) and in less than 15 minutes.

This is just a small sample of individual 404 certifications issued to ITD and demonstrates the variability in language, requirements and specificity. If DEQ is afforded this much flexibility on how these compliance monitoring requirements are written, can't this same flexibility be worked into a mixing zone allowance or site specific Compliance Point sampling determinations.

2) DEQ §401 Certification of the 2012 Nationwide 404 Permits (NWP)

ITD bridge and roadway construction projects result in short term and intermittent discharges, and do not have a long term adverse impact to water quality. DEQ says as much in their July 5th, 2012 Final §401 Water Quality Certification for the 2012 Nationwide Permits (NWP). Page 4, second paragraph, "DEQ recognizes that short term impacts may occur with respect to sediment, but are not expected to cause long term adverse changes to water quality. As a general principle, DEQ believes degradation of water quality should be viewed in terms of permanent or long-term adverse changes. Therefore, short-term and temporary reduction in water quality, if reasonable measures are taken to minimize them, may occur without violating Tier 2 protections."

Then on Page 6 of this Certification in the Turbidity section, in the first paragraph, DEQ states that "All projects must be carried out in a manner that does not violate Idaho's numeric criterion for turbidity.....". And the second paragraph states ".....When monitoring is required, sampling must occur immediately down-current from the in-water disturbance or point of discharge and within any visible plume".

If DEQ recognizes the short term insignificant impact of these projects, why must sampling be carried out immediately down-current from the in-water disturbance? Why can it not be 150 downstream of the disturbance, or some point determined based on project and receiving water specific information?

3) *DEQ §401 Certification of the 2012 Construction General Permit*

Section 9.7.1.6 of the Construction General Permit (CGP) requires turbidity monitoring daily immediately downstream from any point of discharge, and within any visible plume.

Again, based on the short term insignificant impact of these projects, why must sampling be carried out immediately downstream from the point of discharge? Why can it not be 150 downstream of the point of discharge, or some point determined based on project and receiving water specific information?

4) *NOAA/NMFS/USFWS Biological Opinion Requirements*

NMFS identifies in a BO recently completed for an ITD bridge project that structural BMPs used by ITD result in limiting the duration, intensity, and frequency of turbidity releases during construction activities. NMFS identifies that based on previous ITD monitoring, individual turbidity plumes associated with bridge construction activities will be of low intensity, brief, and affect a small area. Previous monitoring indicated turbidity pulses were typically less than 50 NTUs over background levels, rarely extended more than 150 feet downstream from the source, and typically lasted only 15 to 30 minutes.

NMFS assumes a trigger for adjusting operations to reduce turbidity will be a 50 NTU increase over background levels based on standards established by IDEQ, and considers a take if turbidity exceeds 50 NTU over background for more than 60 minutes, or 207 NTU above background instantaneously, 150 feet downstream of each sediment source.

This language highlights that similar to DEQs certification of the NWP, NMFS recognizes in BO documents that short term impacts may occur with respect to sediment, but are not expected to cause long term adverse changes to water quality or conservation value of an action area.

Because of the short term and intermittent nature of a discharge resulting from work under these permits, ITD recommends DEQ consider a mixing zone be allowed, or at least allow for Compliance Point monitoring that is based on project and receiving water specific factors instead of requiring compliance right at the point of discharge.

With the various scenarios identified above, and the variability in requirements depending on DEQ regional office issuing the certification, it is often difficult for the Contractor or ITD inspector to know which scenario is actually dictating water quality monitoring requirements at a given time during construction, and therefore whether the project is fully compliant or not.

General ITD Comments on Mixing Zone Policy Draft 4

- 1) When ITD has coverage under the CGP and therefor NPDES, construction stormwater and non-stormwater discharges are point source discharges. Classifying them as nonpoint source discharges is inappropriate. The definition (66) of Nonpoint Source Activities in 58.01.02.10 contains (c) Construction Sites. ITD believes there should be a qualifier there that says construction sites “without CGP or NPDES coverage”. Additionally, (g) Runoff from storms or other weather related events should also contain a qualifier that says “unless covered by NPDES permit”. Another way of accomplishing this point would be to simply say in 66 that “nonpoint source activities do not include any activities covered by the NPDES program as defined in 62”.
- 2) In Draft 4, DEQ Mixing Zone policy 060.01 is written for Point Source Discharges. We are glad to see the term Wastewater removed as there are many point source discharges permitted as General Permits or NPDES Permits that are Point Source discharges but not Wastewater Discharges.
- 3) In Drafts 1-3, DEQ Mixing Zone policy 060.02 was written for Nonpoint Source Discharges and to allow for the establishment of compliance point monitoring. Currently, DEQ’s §401 certification of General NPDES Permits and U.S. Army Corps of Engineer §404 permits incorporate compliance point monitoring requirements consistent with this section which ITD believes is being inappropriately applied since they are not nonpoint actually sources.

Draft 4 removed the nonpoint source language which ITD agrees with, but still allows for no mixing zone consideration for stormwater and 404 activities/discharges. While DEQ may not be able to formally incorporate mixing zones into NPDES General Permits or §404 permits, ITD believes there is significant room to incorporate more flexibility in compliance point sampling based on site specific information. Allowing more flexibility in this area based on the limited duration, intensity, and frequency of turbidity releases under these permits would have substantial fiscal impact to ITD contracts and allow more funds to be spend on Idaho’s infrastructure and less on water quality monitoring that has little short or long term benefit to the resource.

- 4) DEQ identifies in their §401 Certification of the 2012 CGP and 2012 NWP’s that sediment is the primary pollutant of concern. Sediment is an inert and naturally occurring constituent and there is naturally occurring seasonal variability in most water bodies. Often, during spring flows, turbidity levels are naturally occurring at a level that 2 months later constitutes a water quality violation. ITD believes this should be taken into consideration when considering mixing zone or compliance point sampling for turbidity.

Proposed Language for DEQ Consideration

The language DEQ has proposed, “Specification of mixing zones for some nonpoint source discharges, stormwater, and 404 dredge and fill activities may not be practicable due to their generally intermittent and diffuse nature. Rather, the Department may establish points of compliance with ambient water quality criteria. These alternatives to a mixing zone are still subject zone are still subject to requirements outlines in Subsection 060.01.d.

ITD applauds the recognition by DEQ that points of compliance be considered for discharges of this nature. But the language is very vague as written. ITD suggests consideration of the some or all of the following language.

Add a section 02.a. for discharges covered under General Permits or Individual §404 Permits which could read:

02.a The Department recognizes that discharges covered under General Permits or Individual §404 Permits are generally intermittent and diffuse, and are often necessary to accommodate important economic and social development. The Department reserves the right to determine whether a project has economic and social development value and may determine mixing zone allowances or compliance points for sampling accordingly. A short-term and temporary reduction in water quality may occur without long term adverse changes to water quality and without violating Tier 2 protections.

If implementation of permit provisions and appropriate Best Management Practices cannot prevent a brief exceedance at the point of discharge or immediately down-current of the project disturbance, the Department reserves the right to consider alternative compliance points for monitoring compliance with ambient water quality standards based on some or all of the following project specific conditions:

- I. Pollutants generated by the anticipated discharge
- II. Whether receiving water designated and existing beneficial uses according the Integrated Report will be maintained and protected as a whole
- III. Anticipated background water quality, taking into account seasonal variation, at the time of the anticipated discharge
- IV. Anticipated flow rates of the receiving water at the time of the discharge
- V. Nature, scope, and scale of the activity generating the anticipated discharge
- VI. Location of discharge relative to drinking water wells or drinking water intakes

Thank you for considering our comments.

Sincerely,



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