



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE  
Northwest Region  
Snake River Basin Office  
10095 W. Emerald  
Boise, Idaho 83704

October 2, 2014

Paula Wilson  
Idaho Department of Environmental Quality  
1410 North Hilton  
Boise, Idaho 83706

Re: Comments Regarding the Proposed Mixing Zone Rule (Docket 58-0102-1401)

Dear Ms. Wilson:

The National Marine Fisheries Service (NMFS) has reviewed the proposed mixing zone rule language that was published in the Idaho Administrative Bulletin, Volume 14-9 (September 3, 2014). Our comments below are intended to accomplish two purposes: (1) Illustrate aspects of the proposed rule language that are likely to hinder the Endangered Species Act (ESA) consultation that will be undertaken for the Environmental Protection Agency's (EPA) approval of the proposed rule; and (2) provide recommendations that, if implemented, will facilitate the consultation process. Our comments, or lack thereof for particular aspects of the rule language, do not imply a pre-decisional determination of the outcome of any future consultation associated with this rule language.

#### Protection of ESA-listed Species

As written, the proposed rule language does not provide assurance that ESA-listed species and their designated critical habitats (hereinafter collectively referred to as ESA-listed resources) will be adequately protected. Language addressing ESA-listed resources was included in the first draft negotiated rule, was modified in subsequent drafts, and has since been omitted from the proposed rule language. NMFS commented on the language specific to ESA-listed resources in our May 14, 2014, and June 30, 2014, comments.

According to the Idaho Department of Environmental Quality (IDEQ)<sup>1</sup>, specific ESA language was removed because, "...protecting aquatic life beneficial uses inherently includes all aquatic organisms, including those listed as endangered or threatened." In addition, the IDEQ was concerned that having specific ESA-language in their rule would require the agency to conduct

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<sup>1</sup> IDEQ. 2014. Negotiated Rulemaking Summary Idaho Code §67-5220(3)(f). August 28. 8 pages.



an analysis similar to that currently being conducted by NMFS under section 7 of the ESA. The IDEQ indicated the agency does not have the authority nor the expertise to perform this type of analysis. As described below, NMFS believes that IDEQ's can include language specific to ESA-listed resources that avoids the concerns expressed by IDEQ.

While it is appropriate to conclude salmon and steelhead species are components of the cold water aquatic life (CWAL) beneficial use, it is not correct to conclude that protecting for the general CWAL beneficial use ensures protection of ESA-listed resources. This logic is flawed for two reasons. First, species that are Federally-recognized as endangered or threatened are at critically low population levels and are unable to adapt as readily to human impacts in comparison to species whose populations are functioning appropriately. The ESA came to fruition because Congress recognized that without the added protections afforded to endangered or threatened species (including the ecosystems upon which they depend) many of those species would become extinct. Second, the CWAL beneficial use places emphasis on ensuring water quality is appropriate for the protection and maintenance of a viable aquatic life *community* for cold water species. Arguably, it is not designed to provide specific protections to species or individuals of a particular species where such protections are warranted. The intent of the ESA is to ensure populations do not go extinct, and it also specifically affords protections to individuals. This is supported by review of specific water quality criteria for the protection of ESA-listed species. Examples include the aquatic life toxics criteria (NMFS Tracking Number 2000-1484) and the bull trout temperature criteria in Idaho.

NMFS is not asking IDEQ to determine whether actions jeopardize a species or adversely modify their critical habitat; however, it is critical for IDEQ to have the authority and expertise to ensure impacts to ESA-listed resources are minimized as much as possible when authorizing mixing zones. As we review this rule change, IDEQ is actively seeking NPDES primacy. When the state achieves primacy, NMFS will no longer consult on individual NPDES permits; therefore, to facilitate a smooth transition, IDEQ must be able to ensure adequate protection of ESA-listed resources.

The proposed rule language could be broadly interpreted to mean that no unreasonable interference to the CWAL beneficial use is occurring as long as the authorized mixing zone is configured such that the waterbody *as a whole* is providing adequate spawning, rearing, and egg incubation, and the mixing zone allows for some level of passage. There is no certainty that mixing zone requests in areas containing ESA-listed resources will be reviewed with a higher level of scrutiny.

At a minimum, the rule should afford the IDEQ an irrefutable mechanism to ensure adverse effects to ESA-listed resources are minimized. To provide clarity for the section 7 consultation process that will ultimately be undertaken by the EPA, NMFS strongly advises the following language be incorporated into the rule:

060.01.XX. Mixing zones shall be designed to avoid or minimize adverse effects to species and critical habitat listed under the Endangered Species Act.

### Rule Implementation

As previously stated, there is potential to broadly interpret the proposed language during implementation. Although not an exhaustive list, NMFS is unclear how the following aspects of the rule will be implemented<sup>2</sup>: (1) Determination of whether a mixing zone is larger than necessary; (2) selection of a threshold that is considered to impede fish passage; (3) determination of what it means to prevent successful spawning, egg incubation, or rearing; and (4) evaluation of lethality to aquatic life passing through the mixing zone (e.g., it is unclear whether the concept of delayed, indirect mortality would be considered). In addition, the rule appears to set up a process that would allow for the automatic authorization for using 25% of the critical streamflow volume for dilution without a critical review.

Where there is uncertainty in our evaluation of how and to what extent a particular action may affect a species, NMFS employs the precautionary principle. Legislative history and court decisions indicate that NMFS generally should resolve uncertainty in favor of an ESA-listed species. This is often referred to as “giving the species the benefit of the doubt” or as “institutionalized caution.” Because there is uncertainty and the potential to interpret the rule broadly, it is important to develop and finalize an implementation guidance document that can be referenced during the consultation process. For example, the IDEQ<sup>3</sup> indicated that it is not their intent to automatically authorize the use of 25% of the critical streamflow volume for dilution. If this intent was clearly communicated in the guidance, then NMFS would have greater certainty automatic mixing zone approvals using this level of dilution would be unlikely. Furthermore, this guidance should have adequate regulatory basis to be consistently applied in determining mixing zones.

In closing, NMFS would like to point out that we have not been alone in making these recommendations to the IDEQ throughout the negotiated rulemaking process. The EPA has also made similar comments with respect to ESA-specific language and the timing of guidance document development. Under Section 7(a) of the ESA, the EPA has responsibilities to conserve ESA-listed species and to ensure their actions are not likely to jeopardize the continued existence of ESA-listed species or result in the destruction or adverse modification of their habitats. In order to accomplish these goals, EPA has a responsibility to ensure programs or rules that they approve are designed not only to avoid or minimize adverse effects, but also to design programs that emphasize the conservation of ESA-listed species and their critical habitats. Such conservation could promote species recovery and potentially lead to future delisting proposals.

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<sup>2</sup> NMFS provided comments on these particular aspects of the rule on May 14, and June 30, 2014.

<sup>3</sup> IDEQ. 2014. Negotiated Rulemaking Summary Idaho Code §67-5220(3)(f). August 28. 8 pages.

NMFS has participated in the negotiated rulemaking process in good-faith to provide early input regarding our concerns about protection of ESA-listed resources. We hope that our recommendations are given meaningful consideration, as they are intended to facilitate the forthcoming consultation. If you would like to discuss the contents of this letter further, please contact David Mabe at 208-378-5698.

Sincerely,



David Mabe  
Snake Basin Office Director