UPPER SNAKE RIVER TRIBES FOUNDATION, INC.

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Idaho Department of Environmental Quality State Office
Water Quality Division
1410 N. Hilton
Boise, ID 83706

RE: 2020 Idaho Department of Environmental Quality Water Quality Triennial Review Issue Paper: Performance-based Approach for Temperature Criteria

The Upper Snake River Tribes (USRT) Foundation is composed of four federally recognized Indian tribes of the Upper Snake River region in Idaho, Nevada, and Oregon: the Burns Paiute Tribe, Fort McDermitt Paiute-Shoshone Tribe, Shoshone-Bannock Tribes of the Fort Hall Reservation, and Shoshone-Paiute Tribes of the Duck Valley Reservation. The four tribes have common vested interests to protect rights reserved through the United States Constitution, federal treaties, federal unratified treaties (e.g., Fort Boise Treaty of 1864, Bruneau Treaty of 1866, and Malheur Treaty of 1864), executive orders, inherent rights, and aboriginal title to the land, which has never been extinguished by USRT member tribes. USRT works to ensure the protection, enhancement, and preservation of the tribes' rights, resources, cultural properties, and practices and that those rights remain secured. These include but are not limited to hunting, fishing, gathering, subsistence uses, and religious and ceremonial activities.

USRT recommends that the Idaho Department of Environmental Quality (IDEQ) not prioritize development of a performance-based temperature criteria. Little empirical research exists about performance-based standards in practice, as well as a lack of clear, widely accepted definitional and theoretical vocabulary.[1] Further, performance-based standards tend to be community-based systems, requiring engagement and cooperation from parties in opposition[2], which has led to litigation in some

[1] Cary Coglianese, *Performance-Based Regulation: Concepts and Challenges* (forthcoming in *Comparative Law and Regulation: Understanding the Global Regulatory Process* (2016)) 2, 3, *available at* http://onlinepubs.trb.org/onlinepubs/PBRLit/Coglianese3.pdf.
[2] Donald F. Kettl, *Environmental Policy: The Next Generation*, The Brookings Institution (Thursday, October 1, 1998).

instances.[3] Instead of pursuing development of performance-based temperature criteria, IDEQ should pursue water quality standards (WQS) criteria that are available through the Clean Water Act (CWA), such as site-specific WQS criteria or WQS variances pursuant to 40 CFR 131.14.

Performance-based standards in regulation can be defined in four different categories[4]:

- Performance as a basis for evaluating regulatory programs and agencies (evaluation or management).
- Performance as a criterion for allocating enforcement and compliance resources (targeting).
- Performance as a trigger for the application of differentiated or tiered regulatory standards (tracking).
- Performance as the basis for legal or regulatory commands (standards).

Broadly, these categories all strive towards the goal of "changing the behavior of regulated entities in ways that improve their performance in terms of enhancing social welfare."[5] Despite being widely used in several industries, from child-proofing medicine bottles to building codes[6], and enthusiasm from several United States former presidents[7], little empirical evidence exists on how performance-based standards actually work in practice.[8] From what little literature exists on performance-based standards, the implementation of these standards is far from optimal. Performance-based standards in practice tend to be unclear and lack definitional and theoretical vocabulary that is understood by all.[9] Further, performance-based standards can also be written in a way that is so convoluted that professionals, as well as the public, cannot understand the standards.[10]

Performance-based standards often result in litigation when implemented. In 1972, the Environmental Protection Agency (EPA) developed performance-based standards for carbon monoxide emissions in heavy duty diesel engines.

> The EPA's standard limited carbon monoxide emissions from heavy-duty diesel truck engines to 40 g/BHP-hr and imposed a combined standard for hydrocarbons and NOx of 16 g/BHP-hr. These emissions standards were expressed as grams of emissions per brake horsepower-hour – g/BHP-hr. – to focus on the relationship between the engine's emissions and the amount of work it does, as measured by a dynamometer or friction brake applied to the drive shaft. The regulation required testing emissions following a protocol known as the "steady state" test – basically running a prototype engine through 13 separate "modes" (speeds and torques) specified by the EPA and then averaging the resulting emissions captured by a machine analyzer.[11]

[3] Coglianese, *supra* note 1, at 19.
[4] *Id.*, at 4.
[5] *Id.*
[6] *Id.* at 4-5.
[7] *Id.* at 1-2.
[8] *Id.* at 2.
[9] *Id.* at 3.
[10] Telephone conversation with Austin Walkins, Climate Campaign Coordinator, Idaho Conservation League (June 16, 2020).
[11] Coglianese, *supra* note 1, at 19 (citations omitted).

On paper, this functioned as a classic performance-based standard – the EPA set a standard for diesel engines that had to be met but did not instruct manufacturers how to design or produce diesel engine.[12] By 1998, these standards had been litigated three times – by environmental groups, industry, and the EPA itself.[13] Though the performance-based standards on paper may have looked clear and concise, in practice, this was not the case. Because of the uncertainty of these standards in practice, USRT is concerned that it would result in standards that are more harmful than helpful to the environment, resulting in extensive, drawn-out rulemaking and subsequent litigation, at the expense of Idahoans and the environment.

Instead of pursuing the development of performance-based standards for temperature criteria, Idaho should pursue WQS under the CWA that already exists, such as a variance or site-specific criteria. Pursuant to 40 C.F.R. 131.14, states may adopt WQS variances, defined as "time-limited designated use[s] and criteri[a] for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance[s]."[14] These variances can succeed in water quality improvements in certain situations, such as:

- The designated use and criterion is not attainable now, but the state or authorized tribe believes it can be in the future.
- The feasibility of attaining the designated use and criterion in the future is uncertain, but feasible progress towards attaining the designated use can still be made by implementing known controls and tracking environmental improvements.[15]

The intent of variances serves multiple purposes. Variances ensure that "states and authorized tribes are not required to adopt their own authorizing provisions or procedures,"[16] which "reduces uncertainty and facilitates appropriate, consistent, and effective implementation over a defined period of time[, and e]nsures transparency and accountability to both the regulated community and the public."[17]

Idaho can also pursue site-specific criteria as an alternative to performance-based standards. Pursuant to 40 C.F.R. § 131.11(b)(1)(ii), states may adopt WQS with established numerical values based on CWA §304(a) guidance modified to reflect site-specific conditions.[18] Idaho has used this process numerous times, most recently for EPA review and action on Idaho's revised site-specific criteria for temperature for the Hells Canyon Reach of the Snake River.[19]

For the multiple reasons listed in this comment letter, USRT strongly recommends that IDEQ not prioritize development of a performance-based temperature criteria.

[12] *Id.*
[13] *Id.*
[14] 40 C.F.R. § 131.3(o) (2015).
[15] Environmental Protection Agency Office of Science and Technology and Office of Water, *Water Quality Standards Variances* (Spring 2018) 11, *available at* https://www.epa.gov/sites/production/files/2018-03/documents/variances_101_presentation_web_posting.pdf [hereinafter Environmental Protection Agency].
[16] *Id.* at 12.
[17] *Id.*
[18] 40 C.F.R. § 131.11(b)(1)(ii) (2015).
[19] Letter from Daniel D. Opalski, Environmental Protection Agency Region 10 Director, to Dr. Mary Anne Nelson, Idaho Department of Environmental Quality Water Quality Division Administrator (November 21, 2019).

If comments or questions arise in reviewing this letter, please contact Scott Hauser, USRT Executive Director, by phone ((208) 331-7880) or email (scott.hauser@usrtf.org) at your convenience.

Sincerely,

s:/ *Scott Hauser*

Scott Hauser
USRT Executive Director