

Debbie Kling
Mayor



City of Nampa
411 3rd Street S
Nampa, ID 83651

November 1, 2018

Ronald M. Harriman,
329 Creekside Place
Nampa, ID 83686

Dear Mr. Harriman:

I am writing on behalf of the City of Nampa (“City”) and the Nampa City Council. This letter is in response to your Report dated May 22, 2018 and later supplemented to include a reference to Kuna wastewater discharge (“Report”). The Report calls on the City to challenge the Environmental Protection Agency (“EPA”) and the Idaho Department of Environmental Quality (“IDEQ”) regarding the current regulatory scheme applicable to Indian Creek with the objective of eliminating requirements that add cost to the Wastewater Treatment Plant (“WWTP”) improvements. Thus, the Report recommends a departure from the City’s current “Facility Plan.” The City has given the Report an honest and thorough review.

By way of background, the Facility Plan was adopted by the City Council in February of 2018 after approximately nine (9) years of permit negotiations and the detailed evaluation of over 40 potential alternatives to wastewater treatment. Adoption of the Facility Plan was recommended to the City Council by City staff, professional wastewater consultants, and the Nampa Wastewater Advisory Group (“NWAG”). The Facility Plan has been approved by IDEQ and will, upon completion, meet the regulatory requirements and deadlines in the City’s current Clean water Act (“CWA”) permit. Nampa citizens approved the necessary financing, authorizing the City to borrow up to \$165 million to construct the Facility Plan, by an overwhelming majority of 87% in May of this year.

Given this history, and for the reasons expressed below, the City Council is unwilling to abandon the Facility Plan in favor of the course of action outlined in the Report. Based upon input from both IDEQ and EPA, the City anticipates that regulatory challenges along the lines recommend in the Report will be vigorously contested in court. The City is unwilling to incur the cost, risk and delay necessarily associated with such legal challenges.

The Alleged Misclassification of Indian Creek as a WOTUS

The Report correctly points out that IDEQ has identified Indian Creek as a perennially flowing body of water and subject to regulation under the CWA as a Waters of the United States (“WOTUS”). The Report contends that such classification is erroneous and subject to a successful legal challenge on three bases, 1) Indian Creek is an irrigation facility that only reaches the Boise River intermittently, 2) the definition of WOTUS may change in the foreseeable future, and 3) Nampa’s WWTP discharge is not a “point source” subject to CWA regulation.

First, the Report argues that Indian Creek is more appropriately classified as a ditch, drain or “Man-Made Waterway”¹ because the flow of water is not naturally occurring and is entirely dependent upon upstream irrigation practices. Further, Indian Creek is diverted for seven (7) months per year to Riverside Canal making its connection to the Boise River intermittent.² The argument that irrigation or seasonal waterbodies are not subject to the CWA has been rejected by the courts. The City finds persuasive the response you received from IDEQ in a letter dated October 5, 2018 which is attached as **Exhibit A** for your ease of reference. Given the precedent cited in that letter, the City is advised that Indian Creek’s designation as a WOTUS is unlikely to be overturned in court.

Second, the Report suggests that the evolving nature of the CWA definition of WOTUS may alter the current legal landscape in the City’s favor. This too has been considered by the City. While it is true that rulemaking under the Trump administration represents an effort to pull back from the broader definition of WOTUS sought in Obama-era rulemaking, the City is advised that the current rulemaking process will take years to resolve. For reasons more fully expressed below, the City does not have time to wait out the uncertain resolution of the ongoing federal rulemaking process.

Third, the Report argues that Nampa’s WWTP discharge to Indian Creek is not a “point source” discharge subject to CWA regulation. On the contrary, the City is advised that the point at which the WWTP discharges to Indian Creek meets the CWA definition of “point source” which includes any “discrete conveyance.” Nampa’s WWTP discharges to Indian Creek through a pipe. Piped discharges are specifically covered by the definition of “point source” in the CWA. The WWTP’s discharge pipe is a point source.

There is significant risk that any challenge to the 40 year old designation of Indian Creek as a WOTUS would end unsuccessfully for the City.

State Level Regulation

¹ IDAPA 58.01.02.101.58

² Riverside Irrigation District has indicated a willingness to receive the Indian Creek discharge into the Riverside Canal year round. However, Riverside’s superintendent Andy Bishop has clarified for the City that such an arrangement would not permanently disconnect Indian Creek from the Boise River. Riverside’s current diversion works that direct Indian Creek flows to either the Riverside Canal or the Boise River would remain in place. Indian Creek would still be diverted to the Boise River when weather events cause its flows exceed what Riverside Canal can safely contain and to facilitate regular canal maintenance. Finally, the non-irrigation season diversion would be routed to the Dixie Drain (Dixie Slough) which empties directly into the Boise River. Thus, winter time diversions of Indian Creek would still reach the Boise River only a few miles downstream.

Contrary to assertions in the Report, the City has long understood that Indian Creek was diverted to the Riverside Canal in the summer months and used this fact in negotiating the terms of the current CWA permit. The arguments made in the Report about the impact such diversion ought to have on treatment requirements have already been made. The City has no reason to believe that making the same arguments again will alter the regulatory requirements for the WWTP.

The City is mindful of another concern not addressed in the Report. Even if Indian Creek is not a WOTUS and not subject to regulation under the CWA, it is still subject to similar or identical regulation by IDEQ under Idaho law.

IDEQ regulates wastewater pursuant to IDAPA 58.01.16 (“Wastewater Rules”). “These rules establish the procedures and requirements for the planning, design and operation of wastewater facilities and the discharge of wastewaters and human activities which may adversely affect public health and water quality in the *waters of the state*.” IDAPA 58.1.16.001.02 (emphasis added). Unlike the nuanced and evolving definition of WOTUS, IDEQ’s regulation of “waters of the state” is broader and clearer. The Wastewater Rules define “waters of the state” as “[a]ll the accumulations of water, surface and underground, natural and artificial, public and private, or parts thereof which are wholly or partially within, which flow through or border upon the state.” IDAPA 58.1.16.010.97. No doubt, Indian Creek is a “waters of the state” and subject to IDEQ jurisdiction.

It is the “beneficial use” designations for Indian Creek under the Wastewater Rules, and the treatment requirements necessary to meet them, that determine pollutant loading limits. Thus, within IDEQ’s state level permitting authority, it can be expected to apply the same regulations currently embodied in the City’s CWA permit.

Even if the City were successful in declassifying Indian Creek as a WOTUS, there is significant risk that such an outcome would not change the regulatory scheme applicable to Indian Creek and the WWTP. To achieve meaningful changes to the current regulatory landscape, the beneficial uses of Indian Creek would need to be changed.

Changing the Beneficial Uses of Indian Creek

As an initial note, the beneficial uses of Indian Creek that drive the water quality requirements were not imposed unilaterally by IDEQ or the EPA. Rather, they were developed in conjunction with the “basin advisory group,” the Lower Boise River Watershed Advisory Group, composed of interested citizens from around the Treasure Valley. Similarly, input received from NWAG and the broader public at the time the Facility Plan and bond election were being discussed routinely supported a “fishable/swimmable” water quality level. Given that public input was solicited in connection with the desired uses of Indian Creek, a unilateral decision by the City to challenge these designations strikes us as undemocratic.

The Report argues effectively that the cold water aquatic beneficial use of Indian Creek (i.e. a wild population of rainbow trout) is not currently attained. However, nonattainment is not, by itself, sufficient to downgrade water quality requirements. IDAPA 58.01.02.010.24. Rather, it must be shown that the use is not *attainable*. Idaho Code §39-3607. A “use unattainability analysis” would require years of scientific monitoring and data collection in order to make the case that designated uses could never be attained in the future. The City’s estimate for the cost of such work is \$2 million and may take up to 3 years to gather. Another 2 years of review by IDEQ is likely.

The process may end with the City obtaining proof that the current designations are appropriate. And the City cannot rule out the possibility that data collected will suggest to regulators that beneficial uses with *more stringent* requirements are called for. A prior effort by IDEQ to change the beneficial use designations in the same manner the Report urges was unsuccessful. See **Exhibit A**.

In short, the City is not convinced that challenging the existing beneficial uses of Indian Creek is consistent with public desires. The required use unattainability analysis is too time consuming and too expensive given that the effort may very well be unsuccessful.

The Cost of a Legal Challenges

If the City abandons its current Facility Plan in favor of the regulatory challenges discussed in the Report, ratepayers and taxpayers will incur significant cost to fund the legal battles. There is every reason to believe that IDEQ, EPA and interested environmental groups will contest such efforts at every level. The City estimates legal fees and litigation costs in excess of \$7 million and an uncertain outcome. Consultant fees required to properly prepare a use unattainability analysis of current the beneficial uses are estimated at \$2 million again with uncertain outcome.

The Risk of a Delay

The City estimates, perhaps too conservatively, that it will take at least 5 years of litigation and administrative proceedings to pursue the legal actions suggested in the Report.³ This time delay, perhaps more than any other single factor, imposes unreasonable and unmanageable risk on the City and its residents.

Under the current CWA permit, total phosphorus limits must be met by 2026 and temperature limits must be met by 2031. These deadlines would not be stayed during the legal proceedings. As you know, the total cost of improvements is estimated at over \$200 million. Completing that magnitude of construction at the WWTP, while maintaining 24/7 functional operation throughout, is a massive and complex undertaking. In fact, the City has already begun a design and construction schedule that is necessary to assure timely completion. Any delay in the schedule⁴ results in higher costs as construction trades must accelerate the pace of work to meet the permit deadlines. A delay of 5 years (or more) to pursue the legal claims outlined in the Report would make timely completion impossible and CWA violations would result.

The consequences of willful noncompliance with CWA requirements are completely untenable. Fines of up to \$50,000 per day are possible under the CWA. City decision-makers may face criminal charges and jail time. The EPA may take control of the WWTP and construct upgrades necessary to meet permit requirements presumably at much greater cost than is available now. Given the fact that pursuit of the regulatory relief suggested by the Report is expensive, risky and uncertain, and that the consequences of legal losses are catastrophic, the City is simply without the luxury of sufficient time to pursue the recommendations of the Report and adequately deal with an unfavorable result.

Minimal Cost Savings

Without regard to the City's concerns about legal merits, litigation costs, and time delay, it does not appear that significant cost savings can be realized by abandoning the Facility Plan. As you know, much of the construction cost in the Facility Plan is associated with the upgrade and replacement of WWTP systems that are reaching the end of their useful life and reasonable expansion of system capacity to accommodate future growth. Wholly relieved of phosphorus treatment requirements and temperature

³ John Rapanos, a plaintiff in one of the CWA lawsuits cited in the Report, filled wetlands on his property, allegedly in violation of the CWA, in 1989. His case was not finally decided until some 17 years later, in 2006.

⁴ Conversely, if the City avoids delay by continuing with construction of the Facility Plan while litigating the substantive regulations, the costs sought to be avoided will be largely incurred by the time the litigation is resolved.

reductions, the City may save \$53 million of the more than \$200 million Facility Plan cost. This is a best-case scenario that assumes all legal victories necessary to achieve the results contemplated in the Report. In doing so, the City would incur an estimated \$9 million in legal fees, litigation costs and a use unattainability analysis.

More significantly, in pursuing the objectives of the Report, the City may lose access to State Revolving Fund ("SRF") loans which are currently anticipated to bear a 1.68% interest. Comparable lending the private market is 4-5%. Over the life of the bonds, the difference in interest payments is estimated at \$35 million even after considering the cost savings and shorter private repayment term.

SRF funds are available through an IDEQ program where the City must compete with other agencies on an annual basis. The ranking process is based upon public health and water quality concerns, long-term viability of the system (i.e., sustainability), and the status of the system's compliance with state and federal regulations. With the Facility Plan, the City is currently well-positioned to see most or all of its loan funds provided through the SRF program. However, if the Facility Plan is abandoned in pursuit of an alternative that increases pollutant loading, it is unlikely that the City can realistically compete with other SRF applicants based upon IDEQ's ranking criteria.

In pursuit of the regulatory challenges outlined in the Report, the best case scenario is a savings of \$53 million. However, the litigation costs, consultant fees and increased interest will add \$44 million even if the City is completely successful in its legal campaign. All would agree that a \$9 million⁵ savings is significant, but as noted above the outcome of the legal contest is uncertain at best and the consequences of legal losses catastrophic.

Water Reuse

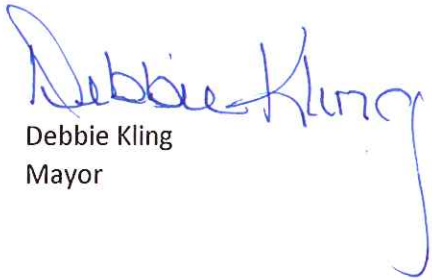
While water reuse is not a component of the Report, the current Facility Plan includes a recycled water reuse component that is entering the permit negotiation phase now. If successful, reuse will save an estimated \$22 million of the current Facility Plan cost estimate. Further, construction of the reuse infrastructure creates economic development potential for the City that Brown & Caldwell has estimated at \$800,000 per year, effectively recapturing all of the potential cost savings available in the Report's best-case scenario within about 11 years. Reuse was also an important factor in NWAG's 75% approval of the current Facility Plan. Finally, permitted reuse and associated infrastructure allows for greater City control of its water resource in the future as water becomes a more and more valuable commodity in the Treasure Valley.

⁵ Even to achieve this savings, the City would be required to increase user rates above the current forecasts advertised in connection with the May 2018 bond election. Those rates were calculated based upon a "blended" borrowing estimate that considered the longer repayment term and lower interest SFR funds. Without SRF funds, rates will increase even higher above the EPA's affordability maximum in the next several years disproportionately impacting the poor and those on fixed incomes.

Conclusion

Again, the City and its staff have given the Report a thorough review and an honest evaluation. Relief from the phosphorus and temperature regulations in the City's current CWA permit as discussed in the Report might save some cost associated with the current Facility Plan. However, that cost savings is relatively modest in the overall scope of WWTP improvements and is contingent upon legal outcomes that are uncertain at best. The City cannot in good conscience expose the citizens to the risks inherent in pursuing the recommendations in the Report. Again, the City sincerely appreciates the work and energy that was required to compile the Report.

Sincerely,

A handwritten signature in blue ink that reads "Debbie Kling". The signature is written in a cursive style with a long, sweeping tail on the letter "g".

Debbie Kling
Mayor